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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. [redacted]28

SAMUEL JOSEPH GIORDANO,
Petitioner,
v.
UNITED STATES OF AMERICA
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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WO. 2-8745—WO. 2-8732

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Petitioner Samuel Jospeh Giordano prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit affirming the judgment convicting the petitioner filed and entered by the United States District Court for the Eastern District of Michigan, Southern Division.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit is reported at — F. 2d —, and is set forth in Appendix A to this Petition (App. 31-39). The opinion of the United States District Court for the Eastern District of Michigan, Southern Division, is not reported.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on December 4, 1967 (App. 40). The mandate of the United States Court of Appeals for the Sixth Circuit was issued on December 27, 1967 (App. 40). The time for the filing of this Petition was extended until February 2, 1968, by order of Associate Justice Potter Stewart, entered on January 4, 1968, and the execution of the mandate was also stayed until the Petition is filed and this Court disposes of this cause, by order of Associate Justice Potter Stewart, entered on January 4, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether a violation of Title 18 U.S.C. §152 can be based exclusively upon acts done prior to the institution of bankruptcy proceedings, in the absence of actual or constructive notice to the defendant, who is not the bankrupt, of the institution of such proceedings, and the appointment of a receiver or trustee.

2. Whether a conviction for violation of Title 18 U.S.C. §152, for concealing assets from the receiver or trustee

in bankruptcy, can be based upon a net worth accounting statement, prepared by an agent of the F.B.I., which net worth statement is based upon books and records of the bankrupt which are admittedly incomplete and inaccurate, and there is no other direct or circumstantial evidence of concealment.

3. Whether the rights of petitioner as to due process of law and the equal protection of the law were violated when the trial judge, acting as the trier of the facts, acquitted one defendant upon the basis that the assets allegedly concealed were not identified as belonging to the bankrupt estate, and convicted the petitioner upon the basis that the identical assets were identified as part of the bankrupt estate.

4. Whether the knowledge and fraudulent intent required by Title 18 U.S.C. §152 and Title 18 U.S.C. §2 can be inferred from the acts performed by an employee in the normal course of his employment, which acts aid, assist and facilitate his employer, the bankrupt, in the realization of the employer's illegal purpose, so as to charge the employee as a co-conspirator and/or aider and abettor in such illegal purpose, without other evidence that the employee knew of the illegal purpose of his employer.

STATUTES INVOLVED

The statutes upon which the indictment of the Petitioner was based are Title 18 U.S.C. §152, Title 18 U.S.C. §2, and Title 18 U.S.C. §371, and are printed as Appendix B to this Petition (App. 41-42).

STATEMENT

(The following method of citing record reference is used herein: Citations to the Petitioner's appendix to his brief in the Court of Appeals have the suffix "a" and no prefix. Citations to the Respondent's Appendix in the Court of Appeals have the suffix "b" and no prefix; citations to unprinted portions of the proceedings on the original trial are cited to the typewritten transcript. These citations have the prefix "Tr." and no suffix. Citations to the Appendix to this Petition have the prefix "App" and no suffix.)

Petitioner, Samuel Joseph Giordano, was indicted in a three-count indictment, together with co-defendants Eugene Ellsworth Ayotte and Matthew Rubino, for conspiracy to conceal assets of a bankrupt estate (Count I); concealing such assets (Count II) and concealing assets of the bankrupt estate specifically on September 9, 1930 (Count III). The case was tried to a District Judge of the Eastern District of Michigan Southern Division, sitting without a jury. The Petitioner and co-defendant Ayotte were convicted of Counts I and II, and acquitted of Count III. The other co-defendant, Matthew Rubino, was acquitted on all three counts. Petitioner and Ayotte appealed to the United States Court of Appeals for the Sixth Circuit. The convictions of both Petitioner and Ayotte were affirmed. Petitioner alone seeks review of the decision of the United States Court of Appeals for the Sixth Circuit by writ of certiorari.

The indictment in this cause was founded upon the activities of the Palm Furniture Company in Detroit, Michigan. The evidence indicated that the defendant, Eugene Ellsworth Ayotte, using the pseudonym, Henry Oliva, instituted the operation of the Palm Furniture Company first by registering the name with the Clerk of Wayne County on June 3, 1960. The assumed name certificate indicated that Henry Oliva, who gave as his residence address the address of the petitioner's former wife, was doing business as Palm Furniture Company (24a, 43b). Ayotte then rented the premises at 14409 East Warren Avenue, Detroit, Wayne County, Michigan from the owner thereof, Sam Misuraca, for the operation of the business (11b-14b). Misuraca never had any contact with petitioner and was unable to identify him (12b).

Ayotte then opened a bank account at the National Bank of Detroit on June 14, 1960 with an initial deposit of $1,600. On June 20, 1960 he deposited an additional $10,000. to this account (14a, 28a). The bank manager, James Horton, testified that Ayotte, representing himself as Henry Oliva, presented the assumed name certificate showing that he was the sole proprietor of Palm Furniture Company, and he was the sole owner of the account (24a, 32a). The petitioner, using the name Joseph Cardo, was hired as a buyer and sales manager for Palm Furniture Company, and given authority to sign checks on the account, first only as a co-signer, and later was authorized to sign checks independent of Ayotte's signature (26a, 27a). The evidence indicated that he co-signed only one check, and never signed any checks in his own name alone (Tr. 2187).

Ayotte then made arrangements to have the sign on the premises changed from Vogue Furniture to Palm Furniture. The petitioner was not involved at all in this arrangement (24b, 27b).

Ayotte was subsequently contacted by a representative of Dun & Bradstreet, who were seeking to establish the financial condition of Palm Furniture Company at the request of some of their subscribers who had been requested to supply merchandise to Palm (37b). Dun and Bradstreet dealt only with Mr. Ayotte, and requested a financial statement which was mailed to them a few days later (29b, 30b). Mr. Giordano, the petitioner herein, had no contact with Dun & Bradstreet, made no representations to them, and was not identified by the witness (29b).

The government alleged in the indictment that one of the overt acts in furtherance of the conspiracy was the filing of false financial statements (4b). The financial statement submitted to Dun and Bradstreet was admitted into evidence (46b), but the evidence introduced independently thereof indicated that the statements contained therein were in fact not false (Tr. 2079). The Assistant United States Attorney, in his argument to the Court, admitted that although the assertions in the financial statement were substantially true at the time the statement was made, they became false shortly thereafter by the removal of the funds from the bank (Tr. 2122, 2312). There was no showing that the petitioner had anything to do with the removal of such funds (Tr. 2192).

Petitioner, in the course of his employment as sales manager and buyer for Palm Furniture, came into contact with suppliers on several occasions. Several representatives of these suppliers were called as witnesses; without exception, each of them who indicated doing business with petitioner stated that he never represented himself to be the owner of the business (75b, 82b), that he was always represented to be the sales manager or buyer (68b, 75b, 87b) and that whenever a question of financing or credit

came up, he always referred the representative of the supplier to Mr. Oliva (52b, 68b, 75b, 82b).

Palm Furniture Company was in operation from June until the middle of August, 1960. During this time, the petitioner worked as the sales manager and buyer. He often told several of his friends that he was working there as a salesman, and several of them bought furniture at Palm (256b). When they did purchase such furniture, the petitioner usually introduced them to Ayotte and the money was paid to Ayotte or given to him by the petitioner (257b, 259b).

In the early part of August, 1960, two vacant buildings were rented on Mack Avenue by Ayotte. One, located at 8425 Mack Avenue, was rented through the instrumentality of one Robert Doyle, a friend of Ayotte's. The other, at 17415 Mack Avenue, was rented by Ayotte from one Ray Ponkey (212b). This rental came about when the petitioner mentioned to a real estate salesman, Donald Barker, who worked for petitioner's brother-in-law, Sam Lentine, that his boss was looking for vacant space to store furniture. Barker made the contact with Ponkey, and brought Ayotte and Ponkey together. The petitioner only made the initial contact with Barker, and had nothing further to do with the negotiation of the rental agreement (240b).

Certain part-time employees of Palm Furniture Company testified to taking furniture from one of the Mack Avenue warehouses and bringing the same to Palm on one occasion (188b). There was no evidence that any furniture was taken from Palm Furniture to either of these Mack addresses (181b). Although furniture was seen by the lessors on the premises of these Mack Avenue buildings, there was no evidence indicating that this furniture be-

longed to Palm Furniture (Tr. 2267). One of these employees testified that on one occasion after Palm Furniture closed, he helped Ayotte move some furniture from one of these Mack Avenue addresses to a farm in Algonac (130b, 131b). On cross-examination, he indicated that petitioner accompanied them on this trip (138b). The judge, as the trier of fact, in acquitting the co-defendant Rubino with reference to this specific occasion, ruled that there was no evidence indicating that the furniture so moved to Algonac belonged to the bankrupt estate (Tr. 2265).

On August 19, 1960, Palm Furniture was closed when one of the creditors sought to contact Ayotte. On August 23rd and 24th, 1960, a Deputy Wayne County Sheriff executed writs of replevin on the premises (55a). The premises were locked when he arrived, and with the cooperation of the owner of the premises, Sam Misuraca, a locksmith was called to make keys and change the locks (19b). The merchandise was replevined (55a); some merchandise was still left on the premises (55a); and the keys were turned over to the owner of the premises (19b). On August 26th, an involuntary petition in bankruptcy was filed, and Arthur M. Schueler was appointed receiver. A subpoena was issued for Ayotte in the name of Henry Oliva, and was returned unserved (235b). On August 30, 1960, Ayotte obtained the new keys to the premises from Mr. Misuraca (20b). Petitioner had nothing to do at all with this transaction, and Mr. Misuraca testified he never met the petitioner (Tr. 31).

The receiver took possession of the premises on September 1, 1960, and in the presence of the F.B.I. agent in charge of the cause, inventoried the merchandise then found on the premises (190a). He testified that thereafter no further merchandise was found to be missing from the premises (191a).

On September 22, 1960, Palm Furniture Company was adjudicated a bankrupt. On October 28, 1960, Arthur M. Schueler was appointed trustee of the bankrupt estate. He testified that during the time he was acting as receiver and trustee, he never had any contact with Ayotte. Service was made by publication (223b), and all mail directed to Henry Oliva, d/b/a Palm Furniture Company, which was sent by the Bankruptcy Court, was forwarded to him as receiver, because he had so directed the postal authorities on August 26, 1967 (174a, 175a). He testified that he learned that Ayotte and Oliva were one and the same person both from the F.B.I. agent and from Ayotte's attorney, but did not act on this information because of a conference he had with Referee Murphy of the Bankruptcy Court, in which the Referee advised him not to do anything because the F.B.I. was conducting an independent investigation (183a, Tr. 1641). No turn-over orders were ever directed to either Ayotte or the petitioner, nor was the petitioner served in any way with notice of the bankruptcy, or requested to appear and testify as to the whereabouts of the assets (186a).

The F.B.I. obtained some books and records of Palm Furniture from S. W. Frankford Accounting Services (266b), who were Ayotte's accountants, not only for Palm Furniture, but for other ventures as well (Tr. 1755). These books and records were admittedly incomplete and inaccurate (5b, 273b-276b). There was no opening inventory shown (285b). Checks which indicated on their face that they were for merchandise were not and could not be matched with the invoices in the records (283b). Sales which were admittedly made during July and August, and which were testified to by several of the government witnesses, were not recorded in the ledger, which only showed sales through the last week in June (279b). Credi-

tors' claims were not independently verified, either by the F.B.I., or the officers of the bankruptcy court (289b, 202a). There was no showing that any demand had been made upon Ayotte for any additional books and records (186a, 202a). There was no evidence that petitioner had any responsibility for, or ever had possession of, the books and records (Tr. 1538).

Based upon the admittedly incomplete books and records, the F.B.I. agent compiled a net worth accounting statement showing that merchandise of a value in excess of $80,000. was unaccounted for. This accounting statement formed the basis for both the trial court's and the Court of Appeal's determination that there had been in fact a concealment of assets by Ayotte and the petitioner, although the agent who compiled the statement testified that he did not take into account sales not reflected in the journal, replevined merchandise, or merchandise which had not been delivered in his calculations (295b-303b). There was no direct or circumstantial evidence tracing any assets identified as belonging to Palm Furniture Company into the possession of the petitioner subsequent to August 26, 1960.

The Court of Appeals for the Sixth Circuit affirmed the conviction of the petitioner, stating (App. 39):

> "While Giordano, alias Joe Cardo, occupied a junior position to Ayotte, and his activities were less observable, he could clearly be identified as aiding and abetting in the substantive offense in Count II (which contained a charge of aiding and abetting, 18 U.S.C. §2); as such, he was intimately involved in the subject matter of the conspiracy charge in Count I of the indictment."

REASONS FOR GRANTING THE WRIT

The basic consideration for granting certiorari in this cause rests upon the administration of the National Bankruptcy Act, and the federal criminal laws relevant thereto. The concealment of the assets of a bankrupt estate from the Bankruptcy Court and its officers, as well as the creditors of the bankrupt estate, frustrates the intent and purpose of the Bankruptcy Act, as well as the administration thereof. For this reason, Congress has seen fit to provide criminal penalties for the perpetration of such concealment.

However, because a great number of bankruptcies involve commercial establishments which employ persons who are not themselves bankrupt or in any way involved in a proprietary manner with the bankrupt, the extent of criminal liability which can be imposed upon such employees because of their involvement with the bankrupt should be carefully delineated.

In this cause, the United States Court of Appeals for the Sixth Circuit ruled that the "intimate involvement" of the petitioner in the activities of the bankrupt, his employer, was, without more, sufficient to warrant his conviction, not only as a co-conspirator, but also as an aider and abettor, and thereby, a principal in the substantive crime of concealment of the assets of a bankrupt estate.

Since all employees, particularly those possessed of the commendable attributes of loyalty, responsibility and obedience, are to a greater or lesser degree "intimately involved" in the business activities of their employers, the ruling of the court of appeals in this cause could set a very dangerous precedent which could involve numerous innocent persons employed by unscrupulous businessmen in extensive criminal liability.

The issues presented by this Petition are of great importance to the Government in the administration of the National Bankruptcy Act, and of equal importance to the determination of the rights of defendants in federal criminal prosecutions under Title 18 U.S.C. Sec. 152. This is further discussed under the enumerated reasons for granting the writ, which correspond to the numbers of the questions presented.

1. The first of the questions presented relating to whether acts done prior to the institution of bankruptcy proceedings can in themselves constitute a violation of Title 18 U.S.C. Sec. 152, has plagued the lower federal courts for years. The last time this Court addressed itself to this question was in 1915, in the case of *United States v. Rabinowich,* 238 U.S. 78, 59 L.Ed. 1211, 35 S. Ct. 682 (1915), wherein Mr. Justice Pitney, speaking for the Court, stated at page 1214:

> "It is at least doubtful whether the crime of concealing property belonging to the bankrupt estate from the trustee, as defined in 29b(1) (the predecessor statute to Title 18 U.S.C. Sec. 152) of the bankruptcy act, can be perpetrated by any other than a bankrupt or one who has received a discharge as such."

Since the decision in the *Rabinowich* case, the lower federal courts have been required to grapple with this problem on numerous occasions, and the decisions have varied, leaving the entire question in confusion.

In *United States v. Agnew,* 225 F. 650 (C.A. Wash.), the Court of Appeals held that in order to constitute the offense of concealing assets of a bankrupt estate, the concealment must have been effected after a petition in bankruptcy had been filed or a discharge granted.

In *Lawand v. United States* (C.C.A. Ohio 1929), 33 F. 2d 582, 14 Am. Bankr. Rep. N.S. 378, the Court of Appeals for the Sixth Circuit held that the concealment must occur during the bankruptcy, but it is not necessary that the assets so concealed be found in the possession of the bankrupt, proof of shrinkage of assets during the bankruptcy proceedings being sufficient.

However, in *Sultan v. United States* (5th Cir. 1957) 249 F.2d 385, the Fifth Circuit held:

> "The crime is concealment of assets from the specified court officers or creditors, and the acts can be done before, as well as after, bankruptcy. (*United States v. Fallman*, D.C. Mass. 28 F. Supp. 251; *Arine v. United States*, (9th Cir.) 10 F.2d 778, 779.)"

An opposite result was reached in *Edwards v. United States*, (9th Cir. 1959) 265 F.2d 302, 306, where the Ninth Circuit said:

> "The offense under the first paragraph of Section 152 does not arise until there is a duty to reveal or disclose, which duty under the terms of the indictment arose on or after May 7, 1953 (the date of filing the involuntary petition in bankruptcy). The fact that the sums of money were transferred or concealed on different dates in December, 1952 and January, 1953, does not create any offense under the first paragraph of section 152. There was then no officer of the bankruptcy court charged with the control or custody of such property, and there were then no creditors in any bankruptcy proceeding, pending against the corporation. Hence there was no duty on the part of the appellants to reveal or disclose such transfers on such specified dates."

In *United States v. Yasser*, 114 F.2d 558 (3rd Cir. 1940) the Third Circuit held:

> "At the time the defendant took the merchandise from Crawfords, Inc. and sold it, he could not have

> been guilty of the offense charged, even though he might have intended to conceal the property from the creditors of the corporation, since it was not then a bankrupt. It is his retention of the merchandise or its proceeds after the bankruptcy of Crawfords, Inc., which is relied upon to sustain the charge of wrongful concealment. A necessary element of the crime described in the statute is that the defendant *knowingly and fraudulently* conceal the property. *United States v. Comstock,* C.C., 162 F. 415; *United States v. Rhodes,* D.C., 212 F. 513. As used in the statute, the adverbs 'knowingly' and 'fraudulently' must have their natural signicance given to them. *Klein v. Powell,* 3 Cir., 174 F. 640. The essence of the crime is knowingly and fraudulently to conceal from the *receiver or trustee* in bankruptcy. It must, therefore, appear that the defendant had actual knowledge of the existence of a receiver or trustee in bankruptcy or that he willfully closed his eyes to facts which made the existence of such an officer obvious." (Emphasis by court.)

In *Rachmil v. United States,* (9th Cir.) 43 F.2d 878, certiorari denied 283 U.S. 819, 51 S. Ct. 344, 75 L.Ed. 1434, the Ninth Circuit stated, at page 880:

> "Under the plain import of the statute we think concealment, however flagrant in respect to creditors, prior to the institution of bankruptcy proceedings and the appointment of a trustee, cannot constitute the offense charged, and knowingly and fraudulently to conceal property from the trustee necessarily implies some knowledge on the part of the bankrupt of the existence of the trustee. Prior concealment may have some evidentiary bearing upon the question of concealment from the trustee after his appointment, but after all that is the essential and the only ultimate question."

The court of appeals in the instant cause, relying upon *Kaplan v. United States,* 7 F.2d 594 (2nd Cir. 1925); *United States v. Weinbren,* 121 F.2d 826 (2nd Cir. 1941) and *Greenspahn v. United States,* 298 F. 736 (7th Cir. 1924) held that the concealment of assets prior to the institution of bankruptcy proceedings could constitute a violation of Title 18 U.S.C. Sec. 152.

In view of the fact that the acts done by the petitioner in this cause were as an employee of the bankrupt, all of the acts done in relation to the bankrupt's business were prior to the institution of bankruptcy proceedings, while the business was still in operation. The acts committed by the petitioner, as shown by the evidence, were all directly related to his employment as a buyer and sales manager and on the surface appeared to be legitimate. However, because of the unscrupulous purpose of his employer, which was not shown by direct evidence to be known to the petitioner, these acts, albeit in the course of his employment, assisted his employer in the achievement of the illegal purpose, i.e., the accumulation of merchandise on credit, and the subsequent concealment thereof from the creditors.

If, as in the case at bar, employees can be held to be aiders and abettors in the illegal purposes of their employers, by doing acts within the scope of their employment, with the necessary element of knowledge and fraudulent intent imputed by the doing of such acts, then a determination of whether concealment prior to bankruptcy with no activity thereafter can constitute a violation of this statute is crucial. Since the employment of such individuals would normally terminate upon the filing of a petition in bankruptcy, or at least the identity of the employer would change to the receiver or trustee, the involvement of em-

ployees would necessarily precede the bankruptcy proceedings. With the decisions among the various Court of Appeals in conflict on the specific question herein presented, this Court should grant certiorari in this cause to define for the guidance of the lower federal courts whether acts constituting, or assisting in, the concealment of assets of a business which later becomes bankrupt constitutes a violation of Title 18 U.S.C. Sec. 152.

2. This Court should grant certiorari on the second question presented in this Petition, as to whether a determination of concealment can be based solely on a net worth accounting statement, since the decision of the Court of Appeals for the Sixth Circuit in this cause is in apparent conflict with the decisions in other Circuits. This Court has never spoken directly to the use of such methods of proof in proceedings arising under a charge of concealment of assets. In *Holland v. United States,* 348 U.S. 121, 99 L.Ed. 150, 75 S.Ct. 127 (1954), Mr. Justice Clark, speaking for this Court, approved the use of such accounting methods as proof of income tax evasion, but in so approving it, he pointed out the inherent pitfalls of such a method, and stated further:

> "While we cannot say that these pitfalls inherent in the net worth method forecloses its use, they do require the exercise of great care and restraint. The complexity of the problem is such that it cannot be met merely by the application of general rules. . . . Trial courts should approach these cases in the full realization that the taxpayer may be ensnared in a system, though difficult for the prosecution to utilize, is equally hard for the defendant to refute."

In the instant case, the proof of concealment of assets rested almost exclusively on the determination of the F.B.I. agent, based on the available books and records, that in excess of $80,000 worth of merchandise was missing or

unaccounted for. This determination was based on the invoices he had available, the cancelled checks, and the sales indicated in the ledger, as verified by bank deposits. The records were admittedly incomplete and inaccurate. There was no opening inventory shown. Checks indicating payments for merchandise could not be matched with the available invoices. Merchandise was replevined and not taken into account. The sales that were taken into consideration only went through the end of June. The business was undeniably in operation into the middle of August, and testimony was introduced by the government as to several sales made to friends of the petitioner during the months of July and August. None of these sales were taken into consideration in the computation. Yet both the trial court and the Court of Appeals for the Sixth Circuit relied heavily on the agent's determination of the amounts of merchandise unaccounted for to sustain the conviction of the petitioner and his co-defendant for concealing assets.

The Court of Appeals for the Sixth Circuit relied on a previous Sixth Circuit case, *Rudin v. United States*, 254 F.2d 45 (6th Cir. 1958) in approving this method of proof. In so doing, it has apparently not taken into consideration the warning given by this Court in *Holland v. United States*, 348 U.S. 121, 99 L.Ed. 150, 75 S.Ct. 127 (1954) as to the caution which must be exercised in the use of such evidence. The decision is also in conflict with other Court of Appeals decisions which have recognized the limitations upon the use of this type of proof, particularly in the light of the *Holland* case.

In *United States v. Tatcher*, 131 F.2d 1002 (3rd Cir. 1942) a case which preceded *Holland*, the Third Circuit held:

> "A period of two and one half months elapsed between the date of the last entries in the bankrupt's

> books and records produced by the Government and the date upon which the petition was filed and the business was actually terminated. The evidence indicates that during that period some merchandise was stolen, some broken and some sold. As to how much of the $12,904.06 of the merchandise on hand as of June 1, 1936 was sold during the months of July and June and the first 17 days of August we can but speculate. It would be equally consistent with the evidence to infer that all the merchandise not stolen, broken or found on the premises was sold and the proceeds used to pay the business and personal expenses of the defendant and his partner as to infer that all or any part of that merchandise was concealed by the defendant. To justify conviction of crime where the evidence relied upon is circumstantial in nature, the evidence must be such as to exclude every reasonable hypothesis but that of guilt. *United States v. Russo* (3rd Cir. 1941), 123 F.2d 420. As we have seen, the evidence relied upon to sustain the defendant's conviction is as consistent with his innocence as with his guilt. We conclude that the evidence did not sustain the charge of concealment of assets of the bankrupt estate from the trustee in bankruptcy on October 19, 1936."

In *United States v. Mathies* (3rd Cir. 1965) 350 F.2d 963, 966, the Third Circuit held in a case where net worth accounting methods showed shortage of $261,645.81 that:

> "The net worth method was approved by the Supreme Court in *Holland v. United States,* 348 U.S. 121, 75 S.Ct. 127, 99 L.Ed. 150, but the opinion enjoins caution in making use of it. The Court pointed out that an essential condition in cases of this type is the establishment, with reasonable certainty, of an opening net worth, a statement equally true of closing net worth. It certainly is not unreasonable to require that when the Government's case in a criminal prosecution consists of circumstantial evidence developed by a mathematical process, there should

> be no uncertainty about the data on which the process is built, and in this case, beyond one or two rather vague inferences, there is very little, if anything, in the evidence, other than the inventory, to show the amount and value of assets on hand at the end of the accounting period. There is nothing at all to identify any particular merchandise on hand."

The petitioner respectfully submits that the circumstantial evidence based on a mathematical formulation is only as good as the data upon which it rests. The data used in arriving at the conclusion of unaccounted for merchandise in this cause was admittedly deficient. Petitioner submits that this Court should grant certiorari to review the question of both the propriety of this type of evidence and the necessary foundation which must underlie its use. The decisions of the Third Circuit and the Sixth Circuit are in conflict, and yet this question is of substantial importance in the administration of both the federal criminal law and the bankruptcy law. In this connection, Mr. Justice Black's observation in *Maggio v. Zeitz*, 333 U.S. 56, 92 L.Ed. 476, 493 is enlightening. In the enforcement of a turn-over order resulting from the determination that the bankrupt had concealed assets from the trustee, the Court issued a contempt order. This Court held the order invalid, and Mr. Justice Black, in a concurring opinion, stated:

> "Furthermore, the finding of possession of the merchandise as of 1943 may rest on an evidential foundation firm enough to support a civil turn-over order, but it is too shaky to support a sentence to prison. Accepting that finding, however, the presumption of present or 1945 possession from the possible 1941 or 1943 possession achieves a procedural result which runs counter to basic practice in our system of laws. For as the District Court said, it gives the prosecution the advantage of a 'presumption' which, of itself, was held to relieve

> the Government from offering further proof of petitioner's guilt in a case where forfeiture of his 'personal liberty and property was sought; it thrust upon the petitioner the burden of proving his innocence.' "

The decision in the Court of Appeals for the Sixth Circuit in the case at bar has achieved the same result which Mr. Justice Black warned against. By basing such a net worth computation upon insufficient books and records, the prosecution has then cast upon the petitioner the burden of making up the deficiency in the books and records, and thereby proving his innocence.

3. The issue presented by the third question in this Petition is based upon the fundamental concepts of due process of law and the basic guarantee of a fair trial in a criminal case, which are guaranteed by the Fifth and Sixth Amendments to the United States Constitution.

The trial judge, sitting as the trier of the facts, without a jury, acquitted the co-defendant, Matthew Rubino, of all counts. In determining that the evidence was not sufficient to convict Rubino, the trial judge made the following determination of fact: (Tr. 2264-2268)

> "As I said before, the evidence discloses that some furniture was stored in two spots—called spots because they aren't quite—they don't quite raise to the dignity of warehouses, they aren't that big, they are small stores, as I recollect—small, vacant stores.
>
> "My problem in this connection is the connecting of the merchandise that went to the farm with that which is subject to this offense, or being a part and parcel of the merchandise fraudulently disposed of, knowingly and fraudulently contrary to the bankruptcy act.
>
> ". . . There is no evidence that this merchandise that was taken in was actually, and has been identi-

fied as the property of the Palm Furniture Company. . . . ."

After making reference to another case which had been reversed by the Court of Appeals, the trial judge then said:

> "The Court threw out Judge Thornton's conviction of that cause under the theory of choice of probabilities. And here we have I don't know how many choices of probabilities with respect this load full of furniture. In fact, it is loaded with inferences, suspicions; strong, yes, but I am impressed by Mr. Louisell's argument as to why wasn't there a search warrant issued. Why isn't there a claim made on the part of the trustee. Is there any real identity of the furniture in the place, or that which was taken out there. Is there any real identity—is there any identifying means through which substantial proof can be made that it is the same furniture that belongs to the Palm Furniture Company. There are vast intervals of time in there which maybe someone else —again probabilities—choice of probabilities that we are talking about in the Sauders case—that other furniture could have been put in those warehouses by friends of Mr. Ayotte's."

Based on the above analysis, the trial judge granted a motion for judgment of acquittal as to Mr. Rubino. However, he denied the motion for judgment of acquittal for the petitioner, and later convicted him. The conviction was affirmed by the Court of Appeals. In finding the petitioner guilty, the trial judge adopted as his findings of fact the statements contained in the United States Attorney's final argument. The United States Attorney laid great stress in his final argument upon these two warehouses, and the fact that merchandise belonging to Palm Furniture was stored therein, and that petitioner participated with Ayotte in the removal of some of this furniture to Mr. Rubino's

farm. (Tr. 2313-2315). In fact, in his final argument, the United States Attorney assumes without arguing that the merchandise in these warehouses belongs to Palm Furniture Company, and represents part of the $80,000 in merchandise unaccounted for. Without reference to any of the choices of probabilities referred to in acquitting Mr. Rubino, for lack of identity which he found regarding the furniture in such warehouses, the trial judge adopts as his findings of fact the argument of the Government attorney.

Petitioner respectfully submits that he is entitled to the same doubts as to the probative value of the evidence as is Mr. Rubino. The same evidence relating to this property was introduced against the petitioner as was introduced against Mr. Rubino. The Court has made an inconsistent determination of fact, based on identical evidence relating to identical property involved in the identical transaction between these two defendants. If the evidence establishing the identity of the property in the warehouses on Mack Avenue is insufficient, it is insufficient for all purposes. To say that Mr. Rubino is not guilty because there is no evidence that the furniture moved to his farm belonged to Palm Furniture, but Mr. Giordano is guilty because he helped move it there deprives the petitioner of the benefit of the doubt which the trier of the fact has already found to exist.

Petitioner respectfully submits that when a judge sits without a jury, his findings of fact with respect to any particular items of evidence apply equally to all defendants. If a doubt exists with respect to a link in the chain of evidence, such as in this case the identity of the property as belonging to the bankrupt, that doubt must be resolved in favor of all defendants equally, and to deny to any one defendant the benefit of that doubt is to deny him a fair trial and the equal protection of the law.

This is not to say that a judge sitting without a jury cannot find one defendant guilty and the other not guilty.

It is only to say that where evidence as to a particular link is found deficient, it is unfair to deny any defendant the benefit of the doubt created by such deficiency.

In the instant case, the court found a doubt as to the identity of the merchandise in the warehouses as belonging to the bankrupt estate. Based on that doubt, Mr. Rubino was acquitted. However, the court then ignored that doubt, and in convicting the petitioner, found that the property did belong to Palm Furniture. This finding was used to substantiate the contention that the petitioner had contact with the bankrupt and the property of the bankrupt after the bankruptcy proceedings had been instituted. This assertion was also relied upon by the Court of Appeals in affirming the conviction of the petitioner, wherein the Court of Appeals stated at great length the activities of the petitioner and Ayotte with reference to the two warehouses. (App. 34-35)

Petitioner submits that this Court should grant certiorari to correct the obvious injustice which has resulted from the denial of the benefit of the doubt specifically found by the trier of the facts with reference to the identity of the furniture in the warehouses, to the petitioner.

4. The fourth question presented by this Petition presents an issue which goes to the heart of this entire case. The petitioner respectfully submits that the issue presented thereby is of substantial importance to the administration of the federal criminal and bankruptcy laws, and the implications presented by the decision of the Court of Appeals on this issue should be corrected and defined by this Court to prevent substantial injustice to employees of unscrupulous bankrupts.

The Court of Appeals affirmed the conviction of the petitioner on the basis that he was intimately involved in the subject matter of the conspiracy and thus an aider and

abettor in the substantive crime of his employer. This ruling, if allowed to stand, could serve as a precedent which would bring all the horrors noted by Mr. Justice Jackson in his concurring opinion in *Krulewitch v. United States*, 336 U.S. 440, 93 L.Ed. 790 (1949) to pass, and in addition some which were not foreseen in his opinion.

The evidence against the petitioner presented by this record is summarized in the Statement to this Petition. In essence it indicates that the petitioner was employed as a buyer and sales manager by the bankrupt Ayotte. In such capacity, he made contacts with suppliers, had the power to write checks on the bank account (which was never exercised), made sales and on one occasion conveyed his employer's wish to rent warehouse space to a friend who was in the real estate business. These acts are those which one would normally expect a buyer and sales manager to perform. The evidence is clear that whenever a question of financing or credit came up, the supplier was referred to the owner, Mr. Ayotte. The petitioner had nothing to do with the books and records of the company, or the preparation of accounting or financial statements. There is no showing that he was ever in possession of any of the assets of the company. In fact, the government's own evidence indicates that two months prior to his employment with this furniture company, he made a legitimate purchase of furniture for his personal use from a different company, and financed it through a small loan company, obtaining an advance from his employer to make a payment on his account. Surely if he were concealing assets of a furniture company at that time, he wouldn't undergo the strain of paying for furniture from another source.

However, the Court of Appeals, in finding his conviction was sustained by the evidence, did so on the basis that he was "intimately involved" in the subject matter of the con-

spiracy, and based on such intimate involvement, thereby imputed to him the necessary elements of knowledge and fraudulent intent. Petitioner respectfully submits that such a finding is inconsistent with the prior decisions of this Court as to the elements necessary to constitute one a co-conspirator, and is also inconsistent with decisions of the various Courts of Appeals with regard to conspiracy and aiding and abetting.

In *Krulewitch v. United States,* 336 U.S. 440, 93 L.Ed. 790, Mr. Justice Jackson, in a concurring opinion, pointed out the dangers of expanding the concept of criminal liability through the device of conspiracy. He said:

> "This case illustrates a present drift in the federal law of conspiracy which warrants some further comments because it is characteristic of the loose evolution of that elastic, sprawling and pervasive offense. Its history exemplifies the tendency of a principal to expand itself to the limit of its logic. The unavailing protest of courts against the growing habit to indict for conspiracy in lieu of prosecuting for the substantive offense itself, or in addition thereto, suggests that loose practice as to this offense constitutes a serious threat to fairness in the administration of justice."

In *Nye & Nissen v. United States,* 336 U.S. 613, 93 L.Ed. 919, 929 (1949), Mr. Justice Frankfurter, in a dissenting opinion, stated:

> "Clarity as to the ground on which a criminal conviction is sustained is indispensible to Anglo-American notions of criminal justice; it is no less indispensible for the guidance of district courts in future prosecutions for conspiracy. Such prosecutions are appropriate to reach a combination united to accomplish a defined criminal purpose; the concept of conspiracy is not an invitation to circumvent the safeguards in the prosecution of crime which are the

> special boast of our democratic society by making it a device to establish guilt, not on the basis of personal responsibility but by association, and we should be at pains to forestall the implication that we have so extended it."

It has always been understood that to be guilty of aiding and abetting, or to be a co-conspirator, there must be knowledge of the criminal purpose of the principal and a sharing of the intent, and in addition there must be direct or circumstantial evidence of an agreement to support a conspiracy. Mere association with the alleged conspirator or principal, or even the doing of acts which assist him in his criminal purpose is not sufficient, absent the knowledge of such criminal purpose, or an agreement between the parties to effectuate such criminal purpose. (*United States v. Kompinski,* (C.A. N.Y. 1967) 373 F. 2d 429; *United States v. Cherry,* (C.A. N.C. 1961) 295 F.2d 842; *Van Huss v. United States,* (C.A. N.M. 1952) 197 F.2d 120; *United States v. Guiliano,* (C.A. N.J. 1959) 263 F.2d 582; *Bacon v. United States,* (C.C.A. Okl. 1942) 127 F.2d 985; *United States v. American Precision Products Corporation,* (D.C. N.J. 1953) 115 F.Supp. 823.)

In *Hernandez v. United States,* 300 F.2d 114 (9th Cir. 1962) the Ninth Circuit reversed the conviction of the defendant for aiding and abetting, stating:

> "The aider and abettor is made punishable as a principal, not as an offender in some special category, and the proof must encompass the same elements as would be required to convict any other principal. 'To find one guilty as a principal on the ground that he was an aider and abettor, it must be proven that he shared in the criminal intent of the principal . . . *Johnson v. United States,* 195 F.2d 673 (8th Cir. 1952). Again, to argue that the proof of the intent necessary to make defendant an aider and

> abettor may be supplied by attributing possession of narcotic drugs to the defendant on the ground that he is an aider and abettor of a principal who is shown to have actual or constructive possession, is to assume the premise which one purports to prove."

In *Ah Ming Cheng v. United States,* 300 F.2d 202 (1962) the Court held:

> "It is, of course, well established that it is not the function of the appellate court to weigh evidence anew to try to determine the credibility of witnesses heard at trial. The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the government to support it. Cf. *Glasser v. United States,* 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680.
>
> "But it is equally well established, that, where a case rests, as this one does, entirely upon circumstantial evidence, the circumstances must be so clearly proven that they point, not merely to the possibility or probability of guilt, but to the moral certainty of guilt. In other words, the inferences which may reasonably be drawn from the facts proven as a whole must not only be consistent with guilt, but inconsistent with every hypothesis of innocence."

The Court, then, finds there is not sufficient evidence to establish the defendant's knowledge of a conspiracy, and in so doing quotes the following from *Kassin v. United States* (5th Cir. 1937) 87 F.2d 183, 184, with approval:

> "It was of a piece with the whole theory of the prosecution, that proof that his co-defendants were guilty, that, using assumed names, appellant had registered at hotels in Florida where some of his co-defendants were registered, and that he had a safety deposit box in a bank where some of his co-defendants had boxes, had put him upon proof of his in-

> nocence. This will not do. Wide-sweeping and damaging as is a charge of conspiracy, difficult as it is for one caught in the net of such a charge to extricate himself from it when the government has any evidence tending to connect him with it, such a charge, no less than charges of substantive offenses, requires proof. This proof may be circumstantial or direct, or both, but it must be proof. That is, the evidence must have a legitimate tendency to compel belief in and finding of defendant's guilt."

In the case at bar, the Court of Appeals found that the defendant was a co-conspirator and an aider and abettor (thereby becoming a principal) in Ayotte's schemes, merely because he was intimately involved in the subject matter thereof. The Court impliedly, without even discussing the issue, thereby imputes from such intimate involvement, the necessary intent to be an aider and abettor, and the necessary agreement to constitute a conspiracy.

The intimate involvement of the petitioner in the activities of Ayotte, as can be seen from an examination of the entire record, all took place prior to the institution of bankruptcy proceedings. The petitioner was an employee of Ayotte, and each and every act or utterance attributed to him were acts and utterances which such an employee would perform in the course of his employment. Because of the unscrupulous plans of Ayotte, these acts and utterances of the petitioner, though on their face entirely legitimate, contributed to and assisted Ayotte in the perpetration of his illegal purpose. However, there is no evidence, other than the doing of these acts which any ordinary employee of a furniture store would be expected to do, that the petitioner had any knowledge of Ayotte's plans.

The implications of criminal liability which can flow from the ruling in this case to innocent employees of unscrupulous businessmen are so far-reaching as to be almost

incomprehensible. Since every employee is intimately involved in the activities of his employer, the test applied by the Court of Appeals in the instant cause could result in every employee of a bankrupt employer who conceals his assets being a potential felon. Such a result would expand the dragnet of conspiracy beyond anything Congress or this Court has ever imagined, and this Court should grant certiorari to correct this decision before such implications become reality.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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Detroit, Michigan 48226,
Counsel for Petitioner.

January 31, 1968.

APPENDIX A

Nos. 17080-81

UNITED STATES COURT OF APPEALS
For the Sixth Circuit

United States of America, *Plaintiff-Appellee,* v. Eugene Ellsworth Ayotte and Samuel Joseph Giordano, *Defendants-Appellants,*	Appeal from the U. S. District Court for the Eastern District of Michigan.

OPINION

Decided December 4, 1967.

Before WEICK, Chief Judge, O'SULLIVAN and PHILLIPS, Circuit Judges.

O'SULLIVAN, Circuit Judge. Appellants Ayotte and Giordano were convicted of conspiracy to conceal, (Count I), and of concealing, (Count II), from the bankruptcy court and its officers, assets belonging to the estate of a bankrupt enterprise, viz: Henry Oliva d/b/a Palm Furniture Company, in violation of Sections 2, 152 and 371 of Title 18 U.S.C. Count I also charged transfer and concealment of assets in contemplation of bankruptcy, and receipt of property and proceeds of the business after the filing of bankruptcy proceedings. The case was tried to a District Judge for the Eastern District of Michigan. A codefendant, one Rubino, was acquitted of all counts and the appellants, with him, were acquitted of the indictment's third count.

Appellants' venture was short-lived and transparently criminal. In May of 1960, appellant Eugene Ellsworth Ayotte, using an alias—Henry Oliva—entered into a lease of a store building in Detroit, Michigan. The two-year term of the lease began on May 27, 1960. Ayotte paid $3,000 advance rent for the first six months of the lease. Ayotte chose Palm Furniture Company as the assumed name for his planned operation and, obedient to Michigan law, filed a certificate of assumed name with the Wayne County Clerk, describing the concern as "Henry Oliva, d/b/a Palm Furniture Company." Exhibiting a copy of this certificate, Ayotte, as Henry Oliva, opened an account in a branch of the National Bank of Detroit with a deposit of $1,600. With Ayotte, when he opened this bank account, was his codefendant, appellant Samuel Joseph Giordano, who chose the alias Joseph Cardo for his participation in the involved enterprise. Both were authorized to sign checks on the Palm Furniture Company account. On June 20, 1960, shortly after the opening deposit, Ayotte deposited an additional $10,000 in the bank. This, as well as the opening deposit, was all in cash—mainly in bills of large demoninations.

The Palm Furniture Company then began an active business. Broad varieties of furniture and appliances were purchased, from a large number of suppliers, and some sales were made out of the rented premises. Through its short history, Ayotte and Giordano were active in carrying on the buying and selling of Palm Furniture Company's goods. Giordano, using the name of Joe Cardo, appeared to be next in command to Ayotte, the apparent owner. Suppliers desiring to sell asked for credit information from Dun and Bradstreet. This concern's representative met Ayotte, as Oliva, and made inquiry as to his background and financial history; this was followed up by receipt of

a form containing Ayotte's background and financial position. It was fair to assume that the report was false.

The business began in early June and was on its way out shortly after the middle of August, with creditors pressing for payment of accounts; a small quantity of goods was seized by writs of replevin, and in late August on several occasions visitors found the place closed during normal business hours. During the course of the operation, at least two buildings—described as warehouses or stores —were rented by Ayotte and furniture or appliances were moved into and out of them. Giordano, as Joe Cardo, participated in some of these activities. On August 26, 1960, an involuntary petition in bankruptcy was filed and a receiver appointed for the alleged bankrupt Palm Furniture Company. The receiver promptly took possession of the store and its few contents. Prior to the receiver's takeover, a deputy sheriff had been unable to serve a writ of replevin because he found the store closed. He called the landlord, who let him in, and then changed the locks on the doors. On this occasion the deputy sheriff told the landlord that Palm Furniture had gone bankrupt. The landlord then got a call from Ayotte who angrily demanded the new key. The landlord refused, saying to Ayotte, "You went bankrupt." Shortly thereafter a lawyer called demanding the key on behalf of his client, Ayotte. The landlord said he had refused to give the key to Ayotte because "he [Ayotte] went bankrupt." The landlord then gave the key to this attorney. When at the premises on the first occasion, the receiver posted a notice that as receiver in bankruptcy he had taken possession of the premises and the contents. He had located the keys in the possession of Ayotte's lawyer. The keys were delivered to the receiver on August 31, but the evidence does not disclose who delivered them, although the receiver's secre-

tary's receipt acknowledges their acquisition from Palm Furniture.

There was evidence that during the involved operation Ayotte rented some warehouse or storage space in several vacant buildings; furniture and appliances were seen there and were sometimes moved out of there. A witness who had theretofore known Ayotte as John Wymore entered into a lease of an unfurnished apartment for a term of one year beginning September 1, 1960. This succeeded an earlier lease of a furnished apartment; it was signed by Ayotte, then employing the name of John DeSanto. Ayotte said that his then change of name was due to a family matter.

A government witness testified that, on behalf of Ayotte, he rented a vacant store at 8425 Mack Avenue, Detroit, for the period from August 3 to September 3, 1960; that during said period goods and merchandise from the Palm Furniture Company had been moved into the premises; that a week or so after the Palm Furniture store had been closed, Ayotte told him that "the creditors had closed the store." The daughter of the owners of these premises leased them to Ayotte's representative. She saw merchandise in the store after the end of the lease, September 3, for about two weeks; then she found the premises emptied and the doors left open. The keys were never returned to her. Another building at 17415 Mack Avenue, Detroit, as a result of negotiations initiated by appellant Giordano, was rented in behalf of Palm Furniture Company for the month of August. Furniture was moved in and out of the building, though no business was carried on there. Toward the end of August, the landlord one morning found that "everything had been removed from the building."

The activities of removing furniture from the several warehouses rented by Ayotte in August, 1960, went on after Palm Furniture had, as was known by Ayotte, been "closed

by creditors," and after a receiver in bankruptcy had been appointed and had taken possession of Palm Furniture Company. One witness who had worked for Palm Furniture for one week during the summer of 1960 testified that in the fall of that year, after Palm had been closed, Ayotte hired him to help move some furniture. He assisted Ayotte and Giordano, after a rental trialer had been procured, in moving certain bedroom furniture from a storefront warehouse on Mack Avenue to a farm near the Algonac-Marine City area, northeast of Detroit. The owner of a Detroit trailer rental lot produced business records evidencing a rental to one Eugene C. Ayotte on September 19, 1960.

Another witness had a like experience, assisting Ayotte in the fall of 1960 in picking up several stoves and a refrigerator from a small warehouse on Mack Avenue and transporting them to a farm east of Detroit. He had worked for Palm for one month during the summer of 1960, and on one occasion had been sent to the same warehouse to pick up a refrigerator to bring back to the Furniture Company. At that time, the warehouse was "about full" of the merchandise handled by the Palm Furniture Company.

An accountant from the Federal Bureau of Investigation obtained the available books and records of Palm Furniture and from them reconstructed its short-lived financial history. He found evidence of unpaid or partly paid invoices in the amount of $89,280.28 covering the period of Palm's operation; there were only $5,762.15 in paid-up invoices. From these figures and several others he concluded that there had been $101,042.43 in total purchases at cost. His inventory of merchandise on hand as of September 1, 1960, showed $5,743.50 at cost. (This netted $4,513.50 at auction.) He added to the $5,743.50 inventory an estimated amount of $10,474.80 for sales, based upon the record of

deposits made to the Palm bank account during the period of operation. Subtracting these two amounts from the $101,042.43, he computed that merchandise received and not accounted for totaled $84,824.13 at cost. By examining check stubs from the Palm account, he was able to estimate that the total amount paid out to suppliers during the whole business life of Palm Furniture was $10,243.33. His schedule of amounts claimed by the various creditors bore these figures out. See *Rudin v. United States,* 254 F(2) 45 (6th Cir. 1958), wherein Judge Shackelford Miller, Jr., discusses the propriety and probative value of similar computations.

Upon the filing of the petition for involuntary bankruptcy, process was issued for service on Henry Oliva, d/b/a Palm Furniture. The United States Marshal who attempted service returned it not found and substituted service was made. There was no direct evidence that appellants Ayotte or Giordano were effectively notified or knew of the filing of the bankruptcy petition; there was evidence that Ayotte was, under the advice of his attorney, staying "under cover" following the bankruptcy. Neither of the appellants testified.

We have, at the above length, set out the government's evidence because the only substantial question presented by appellants is whether the evidence was sufficient to permit the District Judge to find them guilty of the crime charged. We are satisfied that it was, and affirm the District Court.

Familiar rules guide us to this conclusion. Guilt may be established by circumstantial evidence. *Holland v. United States,* 348 U.S. 121, 139-40, 99 L. Ed. 150, 166-67 (1955); *United States v. Carter,* 311 F(2) 934, 940 (6th Cir. 1963), *cert. den.* 373 U.S. 915; *United States v. Decker,* 304 F(2) 702, 705 (6th Cir. 1962); *United States v. Comer,* 288 F(2) 174, 175 (6th Cir. 1961). In determining whether there

was sufficient evidence to allow the trier of the facts—in this case the District Judge—to convict, the evidence and legitimate inferences to be drawn therefrom are viewed in a light most favorable to the government. *Glasser v. United States,* 315 U.S. 60, 80, 86 L. Ed. 680, 704 (1942); *United States v. Conti,* 339 F(2) 10, 13 (6th Cir. 1964); *United States v. Berkley,* 288 F(2) 713, 716 (6th Cir. 1961); *Battjes v. United States,* 172 F(2) 1, 5 (6th Cir. 1949). The broad pattern of the case at bar is familiar to this Court. See *United States v. Vida,* 370 F(2) 759 (6th Cir. 1966); *United States v. Blane,* 375 F(2) 249 (6th Cir. 1967).[1] We think the District Judge could quite easily find that the plan and activities of Ayotte and Giordano fitted the often quoted language of Judge Learned Hand in that it was a scheme,

> "to obtain supplies, make quick sales, collect the proceeds, and then allow the company to fall into bankruptcy, making off with such loot as might meanwhile have been gathered." *Kaplan v. United States,* 7 F(2) 594, 595 (2nd Cir. 1925).

There was ample evidence that in the little over two month's life of Palm Furniture Company, Ayotte and Giordano, using the aliases Henry Oliva and Joe Cardo, respectively, were the operating managers of the venture. Within this short time they bought merchandise in cost amount of about $100,000, paying out only about $10,000, and then sometime in August abandoned the store premises, leaving a relatively small amount of merchandise in the store. They then apparently, went "underground"

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[1] See also this Court's unpublished order in *United States v. Eugene Ellsworth Ayotte,* No. 17,185, March 2, 1967, *cert. den.* October 10, 1967, 36 U.S.L. Week 3144, wherein we affirmed Ayotte's conviction of transferring and concealing assets in contemplation of bankruptcy of an enterprise which he carried on after closing of the Palm Furniture Company. He then used the name Louis Beatrice in the operation of the Grosse Pointe Jewelry Store.

while their creditors were forced to institute bankruptcy and have the visible remnant of the inventory seized. In the meantime, goods were being moved to vacant stores and after the commencement of bankruptcy one, or more, of these stores was emptied of a cache of supplies—both appellants participating in removing assets out of the city of Detroit. It is indeed a fair inference that these goods were purchased by Oliva, d/b/a Palm Furniture, and rightly were a part of the bankrupt estate and under all the circumstances it could be inferred that the removal of the goods before bankruptcy was in contemplation of its inevitable happening. In *United States v. Weinbren,* 121 F(2) 826 (2nd Cir. 1941), the Court said:

> "But if the [Court] found, as well it might, that these appellants, knowing that the bankruptcy • • • was soon to follow, conceived and brought about the secret removal of assets from the store • • • and that their real purpose was to convert the goods permanently and fraudulently to their own uses; and to that end to conceal them from whomsoever necessary to accomplish their purpose, a finding that concealment from the trustee in bankruptcy was deliberately planned and carried out was justified." *Id.,* at 828.

The fact that there was no direct evidence of an agreement between appellants to conceal assets in contemplation of bankruptcy and no direct proof that they were immediately aware of the institution of bankruptcy, does not render insufficient the government's evidence. The following from *Greenspahn v. United States,* 298 Fed. 736, 738 (7th Cir. 1924), is pertinent in this regard:

> "While no witness testified that a bankruptcy proceeding was in actual contemplation of the alleged conspirators, this does not necessarily bar conviction for a conspiracy to violate section 29b. Conspiracy

to violate this section may be shown, without any proof of appointment of a trustee, or of pendency then or thereafter of bankruptcy proceedings. Meyer v. United States, 258 Fed. 212, 169 C.C.A. 280; Steigman v. United States, 220 Fed. 63, 135 C.C.A. 631; Radin v. United States, 189 Fed. 568, 111 C.C.A. 6; United States v. Cohn (C.C.) 142 Fed. 983.

"Persons must be held to intend the natural and reasonable consequences of their acts. Where insolvents, heavily in debt and evidently reaching a crisis in their affairs, deliberately conceal a considerable part of their tangible assets, they should be held to have had in contemplation that the normal consequences would unsue, that the bankruptcy laws of the land would have application, and that a trustee in bankruptcy would in due course be constituted." 298 Fed. at 738.

There was sufficient evidence to permit the District Judge to consider the question of the guilt of appellants on both Counts I and II, and the conviction is amply supported by the evidence. While Giordano, alias Joe Cardo, occupied a junior position to Ayotte, and his activities were less observable, he could clearly be identified as aiding and abetting in the substantive offense in Count II (which contained a charge of aiding and abetting, 18 U.S.C. §2); as such, he was intimately involved in the subject matter of the conspiracy charge in Count I of the indictment.

Judgment affirmed.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 17,081

United States of America,
Plaintiff-Appellee,
v.
Samuel Joseph Giordano,
Defendant-Appellant.

Before: WEICK, Chief Judge, O'SULLIVAN and PHILLIPS, Circuit Judges.

JUDGMENT

(Filed December 4, 1967)

APPEAL from the United States District Court for the Eastern District of Michigan.

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Michigan and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

No costs awarded. Rule 23(4).

Entered by order of the Court

Issued as Mandate:
Costs: None.

/s/ Carl W. Reuss,
Clerk.

APPENDIX B

Text of Title 18 U.S.C. §2:

(a) Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done, which, if directly performed by him or another would be an offense against the United States, is punishable as a principal.

Text of Title 18 U.S.C. §152:

"Whoever knowingly and fradulently conceals from the receiver, custodian, trustee, marshal or other officer of the court charged with the control or custody of property, or from creditors in any bankruptcy proceeding, any property belonging to the estate of a bankrupt; or

"Whoever knowingly and fraudulently makes a false oath or account in or in relation to any bankruptcy proceeding; or

"Whoever, knowingly and fraudulently presents under oath any false claim for proof against the estate of a bankrupt, or uses any such claim in any bankruptcy proceeding, personally, or by agent, proxy, or attorney, or as agent, proxy, or attorney, or

"Whoever knowingly and fraudulently receives any material amount of property from a bankrupt after the filing of a bankruptcy proceeding, with intent to defeat the bankruptcy law; or

"Whoever knowingly and fraudulently gives, offers, receives or attempts to obtain any money or property, remuneration, compensation, reward, advantage, or promise thereof, for acting or forbearing to act in any bankruptcy proceeding; or

"Whoever, while an agent or officer of any person or corporation, and in contemplation of a bankruptcy proceeding by or against such person or corporation, or with intent to refeat the bankruptcy law, knowingly and fraudulently transfers or conceals any of the property of such person or corporation; or

"Whoever, after the filing of a bankruptcy proceeding or in contemplation thereof, knowingly and fraudulently conceals, destroys, mutilates, falsifies, or makes a false entry in any document affecting or relating to the property or affairs of a bankrupt; or

"Whoever, after the filing of a bankruptcy proceeding, knowingly and fraudulently withholds from the receiver, custodian, trustee, marshal, or other officer of the court entitled to its possession, any document affecting or relating to the property or affairs of a bankrupt,

"Shall be fined not more than $5000. or imprisoned not more than five years, or both."

Text of Title 18 U.S.C. §371:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000. or imprisoned not more than five years, or both.

"If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

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IN THE

Supreme Court of the United States

OCTOBER TERM 1968

No. [redacted]-54

MICHAEL J. SCANDIFIA,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

October Term 1967

No.

MICHAEL J. SCANDIFIA,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER, Michael J. Scandifia, respectfully prays that this Court issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, affirming Petitioner's conviction for violating Title 18 U.S.C. §§ 2314 and 2 ("wilfully causing" the interstate transportation of counterfeit securities), nine counts.

Opinion Below

The opinion below in the Court of Appeals, Second Circuit, not yet reported, is reprinted in the Appendix hereto (App. A1-14).*

---

* Unless otherwise indicated, the Appendix to this brief is prefixed by "App."; to the Government's Appendix below by "G-".

Jurisdiction

The jurisdiction of this Court is invoked under Title 28 U.S.C. § 1254(1). The Court of Appeals, Second Circuit, denied a motion for rehearing on March 5, 1968, thereby adhering to its affirmance of the judgment of conviction (rendered January 31, 1968).

Questions Presented

1. Whether 18 U.S.C. 2314 is being constitutionally applied against Petitioner in view of the fact that he never transported any of the securities nor was there any evidence that he "knowingly" or "wilfully" *caused* others to do so.

2. Is 18 U.S.C. 2314 so vague and nebulous as applied in a situation like the case at bar that it denies an accused due process of law since it permits prosecution without knowledge of or participation in the transportation by the accused.

3. Whether Petitioner received a fair trial in view of the adduction of inadmissible prejudicial testimony by the prosecutor, apparently with pre-conceived design, and the articulation by the Court of a legally incorrect charge to the jury.

4. Whether testimony by "accomplices" should be deemed sufficient to warrant conviction for crime without cautionary instructions as to reliability and "interest", and without requiring "corroboration".

5. Whether the defendant was denied a "speedy" trial as a matter of law where the prosecution commenced almost on the eve of the expiration of the statute of limitations,

particularly where such delay may have been deliberate and calculated to deny a fair trial.

Constitutional and Statutory Provisions Involved

Pertinent portions of the Fifth and Sixth Amendments and Title 18 U.S.C. §§ 2314 and 2 are reprinted in Appendices, (App.)

Statement of the Case

The petitioner, Michael J. Scandifia, was indicted on 11 counts, each charging that on a specific day, between November 11, 1960 and November 30, 1960 he had *"wilfully, and knowingly and with unlawful and fraudulent intent"* caused "to be transported in interstate commerce" certain falsely made, forged and counterfeited securities (see indictment).

The indictment was returned in 1965, almost the full period of the Statute of Limitations.

The securities involved were Shell Union Oil Co. bonds and the points of transport were New York City and Monmouth County, New Jersey.

Following a mistrial because of a dead-locked jury, a second trial held before Tenney, D.J. resulted in a conviction on nine counts (the only counts submitted) for which Petitioner-Defendant was sentenced to concurrent terms of six (6) years on each count.

The Facts Considered

The indictment against Scandifia did not charge a conspiracy as a substantive crime, nor did it allege that he acted in concert with others. It charged that acting alone, and unaided, he "wilfully and knowingly" *caused* the interstate transportation of certain Shell Union Oil Company bonds which he "knew" to be counterfeit.

The government introduced evidence that in some manner Petitioner had acquired certain Shell bonds which he then supposedly used in connection with a scheme whereby certain "innocent" investors could obtain short term loans using the bonds as collateral. Scandifia's share in this plan was to be a payment of 60 per cent of the face value of the bonds.

The Petitioner took the stand in his own defense and of course denied all of the accusations. He testified that he was 48 years old, married, and had never been convicted of any crime.

The proof adduced at trial revealed that Scandifia was never charged with having transported any of the bonds. There was no proof at all that he "knew" that the bonds were to be transported. He never gave any instructions that they be transported, nor was there any evidence that of necessity, it was inevitable that they would so be transported.

As a matter of fact, there was no evidence that the Petitioner ever knew that the bonds were counterfeit until a government witness, Hersch, allegedly told him so following information Hersch had received from another witness, Rabstein.

As a matter of fact, loans were obtained from the banks by pledging these bonds until somewhat later, it was allegedly reported that some were counterfeit.

When the Witness Cohen was called by the Government, he was asked certain self-serving questions probing the operation of his own mind. The answers, as will be discussed infra, indicated that Scandifia had a "criminal" background, without proof or foundation, despite the fact that he had never previously been convicted of a crime. This was egregious error.

POINT I

The statute, 18 U.S.C. § 2314 permits conviction only if someone transports certain articles such as counterfeit securities in interstate commerce or knowingly and wilfully causes such property thus to be transported. Scandifia, as recognized even by the trial court, did not himself transport any of the bonds, and was not aware that anyone else so transported them. Yet, conviction was ruled permissible because Scandifia had delivered the securities without "limitation" as to where they were to be transported.

—A—

The lack of knowledge on petitioner's part that the securities would be transported across state lines by others without his approval or consent was nevertheless deemed consistent with a violation of this statute as the trial court held that the statute could be violated without knowledge or intent. This renders the statute unconstitutionally vague and exposes the most innocent person to conviction.

The entire case herein turns on the question of whether Scandifia "knowingly" and "wilfully" *caused* the interstate transport of certain counterfeit bonds.

There was absolutely no proof or charge that Scandifia himself transported any of these bonds in violation of the Statute. There was a total dearth of proof that Petitioner knew or could have known that these bonds would be transported across State lines.

The indictment did not charge that Scandifia either engaged in a conspiracy or acted in concert with anyone else. Thus, the act of an accomplice legally could not be imputed to him since the government proceeded on the premise that no accomplice or co-conspirators existed.

The act of Hersch in admittedly taking the bonds from New York to New Jersey, albeit without Scandifiia's knowledge or instructions, was deemed a criminal act of Petitioner's. Scandifia clearly did not encourage, sanction, know of, or ratify the actions of anyone else in transporting the bonds.

The trial court however, misinterpreting the Statute, charged the jury as follows (Record p. 796):

> "Now, the statutes which the indictment charges were violated by this defendant do *not require proof* by the government of *knowledge* on his part that the bonds were to be transported in interstate commerce. The government is only required to prove in this connection that the bonds were actually transported in interstate commerce and that the defendant caused them to be so transported.
>
> "If the defendant turned over bonds to Hersch or to some other person *without limitation* as to where they were to be transporated, and if in fact thereafter the bonds were transported in interstate commerce, then the jury might properly find that the defendant *caused* their transportation in interstate commerce." (R. 796)

Thus it is clear that the trial judge and the Court below, assume that the Statute permits conviction without knowing or wilful participation in the crime. It must be borne in mind that the possession of a counterfeit security is not *ipso facto* a violation of this statute. It is the knowing and wilful transportation across state lines, or knowing and wilful "causation" thereof, that *alone* results in violating this law.

If Hersch were charged with being an accomplice or co-conspirator, then perhaps the acts of Hersch could be charged against Scandifia. But the theory of the Government was that Hersch was no such thing—that he had no conspiratorial connection with Scandifia at all. In that light, it is inconceivable that his act in taking the bonds to New Jersey from New York could in any way bind Petitioner unless Petitioner "knew" or ordered or ratified the transportation. There is no such evidence. The trial court charged the jury that it need not concern itself with such evidence.

In essence, the trial court held that if the bonds were in fact transported by anyone, irrespective of Scandifia's knowledge or awareness or participation, the indictment could be sustained.

In the instant case, we do not have a situation like that presented in *Pereira* v. *United States,* 347 U.S. 1, 9 where the Court could find that it was "common knowledge" that the property would have to cross state lines. There the Court was considering checks deposited, but drawn on an out of state bank. Obviously, in order to collect or clear them, they would have to cross state boundaries.

But *Pereira* also holds that "knowledge" is a prerequisite. In the present case, there was admittedly no "knowledge". As seen from the Court's charge, the jury was not required to determine if Scandifia knew about the possibility that the bonds would be transported across state lines. This therefore, presumes that the person who *ever* touches a counterfeit or stolen item must thereafter become an "insurer" that it will never thereafter move across a state or national border. It is not conceivable that such is the law. The Statute does not so provide—and the indictment required that the jury find "wilful and knowing" violations, not retrospective happenstances that at some time the bonds crossed state boundaries.

Unlike in *Pereira* v. *United States, supra,* the Petitioner herein could not have had "common knowledge" that the bonds would be transported to New Jersey.

Even the Second Circuit could not swallow the argument that the omission of Scandifia to "limit" the area where the bonds could be taken was sufficient to render him liable to conviction.

In the Solicitor General's opposition to Bail, he cites *Pereira* and indicates that the jury could have found certain facts. But such reasoning is not in accordance with the case itself or the trial court's interpretation of the Statute. The trial Court charged that if the jury found that Scandifia had in fact delivered the bonds without "limitation" of where it was to be taken, *that was enough!* That is *not* what this Court in *Pereira* or the statute or the indictment say.

At 1278 of the slip opinion of the Court below, the Second Circuit condemned the vagueness of the charge on the question of "without limitation". (App. 11)

See: Hart & Honoré, Causation in the Law 64.

In addition, the case at bar did not involve a letter which one might reasonably foresee could be mailed (*United States* v. *Weisman,* 83 F.2d 470, cert. denied 299 U.S. 560; nor can it be said that Scandifia "brought about" the result (*United States* v. *Kenofskey,* 243 U.S. 440, 443).

The Circuit Court dealt in speculation as to what the jury might have gleaned or found from the record. Were it not for the patently incorrect charge on the law to be applied, perhaps the Circuit Court would have been justified. But in light of the fact that the jury need only have found that Scandifia gave the bonds "without limitation" as to where they were to be taken to convict, it is clear that the Court below was speculating on the basis of the record without paying heed to the actual charge as rendered.

To say he "caused" this transportation is the most Pickwickian and fatuous interpretation of law that can be imagined. The charge was plain error (52-(b) F. R. Crim. P.).

In *Todd* v. *United States,* 158 U.S. 278, 282, our highest Court observed:

> "It is axiomatic that statutes creating and defining crimes cannot be extended by intendment, and that no act, however wrongful, can be punished under such a statute unless clearly within its terms. 'There can be no constructive offenses, and, before a man can be punished, his case must be plainly and unmistakably within the statute'. *U.S.* v. *Lacher,* 134 U.S. 624. . . . End. Interp. St. (2d Ed.) Sec. 329; Pm. Sedg. St. Const. Law, 280."

POINT II

The petitioner was denied a fair trial by the premeditated and calculated adduction of evidence by the prosecutor that Scandifia had been indicted for a similar crime and that he may have had a "criminal" background. The latter was particularly flagrant since in the abortive "first" trial, a similar tactic was used and an objection sustained.

The United States Attorney trying the case was undoubtedly aware that the petitioner had never been convicted of a crime and that he would take the stand. In the first trial, which ended in a hung jury, the prosecution witness, Cohen, sought to testify as to the "criminal" background of Scandifia—who had never been convicted before.

The questioning of Cohen on redirect elicited the following: (G-61a; Record 237, 238):

> "By Mr. Fawer:
>
> "Q. Why did you tell the F.B.I. what you did in 1960 and 1961?
>
> "Mr. Brodsky: Objected to, if your Honor please.
>
> "The Witness (Cohen): It is pertinent your Honor.
>
> "The Court: Overruled: I will allow it.
>
> "A. My family had received threatening phone calls.
>
> "Q. I ask now why did you? A. For fear of my family's life, *knowing Mr. Scandifia's background.*
>
> "Mr. Brodsky: I move to strike it out. At this time I respectfully ask for a withdrawal of a juror and the declaration of a mistrial.
>
> "The Court: Denied.
>
> "Mr. Brodsky: I respectfully except.
>
> "The Court: The jury will disregard the last part of the statement." (G. App. 61a; R. 237, 238)

But this was not "unexpected responses" innocently elicited. The record of the first trial, the mistrial, at pages 255 and 256 of minutes of February 9, 1967, show a similar pattern of questioning with similar if not identical responses. Thus the questioning was a premeditated and calculated design to prejudice the petitioner and to poison the minds of the jury.

Thus, it is submitted that where a *premeditated and deliberate intent is manifested to elicit prejudicial testimony,* that ipso facto is sufficient to warrant a reversal.

Thus in *United States* v. *Tamaiolo* (2 Cir. 1957), 249 F. 2d 683, this court noted that prejudicial testimony elicited with probable knowledge of what would be said, precluded a fair trial (id. at 695):

> "It made a fair and impartial trial impossible. Although the jury was advised to *disregard the statement that could not have erased* from their minds the prejudicial effect . . .
>
> ". . . it is fairly apparent that the prosecutor *knew* the answers . . . certainly the . . . F.B.I. [and Cohen] had already advised him, out of court . . ." (italics ours)

In *Nash* v. *United States,* 54 F. 2d 1006, 1007 (2 Cir. 1932) and *United States* v. *Bozza* (2 Cir. 1966), 365 F. 2d 206, 215, that court noted that such an instruction (to disregard statement) was meaningless since no jury is capable of such a *mental gymnastic.* The remark gave the impression that Scandifia had a criminal background, although he had never been convicted of any crime.

With knowledge, at least from the first trial where the Judge (Wyatt) had sustained an objection, the prosecutor had no right to pursue this line of questioning from which he had every reason to know that prejudicial and inflammatory conjecture would flow.

POINT III

The evidence could not have established a crime unless the Government's witness, Hersch, and perhaps Cohen were found to be accomplices. No indictment for conspiracy or acting in concert existed. Moreover, the Court should have issued cautionary instructions with respect to corroboration and the "weight" to be accorded to Cohen and Hersch. There is no "agency" in criminal law—all are "principals."

The evidence from Hersch and Cohen indicates that they were engaged in an "easy money" plan which they said emanated from Scandifia. The prosecutor took the position that Hersch and Cohen were "agents". This is nonsense, since *there is no doctrine of "agency" in the criminal law.* All who participate or aid and abet are "principals", not agents. There was no "conspiracy" count and therefore the acts of Hersch and Cohen could not be made binding on Scandifia. (See, 18 U.S.C. § 2; 371). When testimony of Cohen and Hersch was used as the mainstay of the prosecution's case, the government was using the theory of "accomplice", although no indictment so charged and the jury was not permitted to so infer.

In view of this, the Court should have charged, *sua sponte* that the testimony of Cohen and Hersch should be scrutinized with the same care as that of Scandifia himself.

See:

McMillen, Jr. v. *United States,* F.2d (1st Cir. 11/28/67), 3 Crim. L. Bull. No. 10, p. 698;

Rule 52(b) F.R. Crim. P.

Testimony of such persons who themselves could be prosecuted should be held insufficient as a matter of law to warrant a conviction without other evidence tending to connect the defendant to the crime. At least the trial courts should be required to so charge (Compare: Section 399 N.Y. Code Crim. Pro.)

POINT IV

The appellant was prejudiced as a matter of law by an inordinate delay of almost five years time between the offense and the prosecution. This delay appears to be calculated, rather than unavoidable, since the offense must have been known for some time.

The petitioner was prejudiced as matter of law by the inordinate and prejudicial delay between the time the crime is alleged to have occurred and the indictment. This denied him "speedy justice," and violated his rights under the Sixth Amendment, viz: *offense* committed in November 1960; *indictment* in Sept. 30, 1965.

This indicates that virtually the entire period of the statute of limitation had expired before indictment. Memories grow dim; records are lost; witnesses die or disappear and it lulls a suspect into a false sense of security that he will not be prosecuted and that there is no need to recollect events, keep records or stay in contact with witnesses. This case indicates it may be part of a pattern in bringing prosecution in this District as is seen from such cases as *United States* v. *Feinberg* (2 Cir. 1967), Docket # 30739; *United States* v. *Granello* (CA 2d 1966) 365 F. 2d 990 and so forth, where inordinate delay is indicated despite the fact, as herein, the government was apparently aware of the alleged crime for some time.

Here again, there was no exception or motion made, but it is submitted that fundamental fairness requires action by this Court where it may be a calculated design to prevent a fair trial or the making of a proper defense.

See:

United States v. *Provoo,* 350 U.S. 857 (1955);
People v. *Prosser,* 309 N.Y. 353;
Klopfer v. *North Carolina,* U.S. (1967).

See, too:

Godfrey v. *United States,* 358 F. 2d 850, 862 (D.C. Cir. 1966);
Ross v. *United States,* 349 F. 2d 210, 211 (D.C. Cir. 1965);
United States v. *Hammond,* 360 F. 2d 688 (2 Cir. 1965);
United States v. *Lustman,* 258 F. 2d 475 (2 Cir. 1958).

It is clear that delay of such long duration may not only violate the Sixth Amendment speedy trial provision, but may well also violate the Fifth Amendment due process provision. (*Ross* v. *United States* (D.C. Cir. 1965), *supra,* 249 F. 2d at 211. See, also, *Regina* v. *Robbins,* 1 Cox C.C. 114 (1844). The lack of speedy justice ought to be treated in the same manner as other constitutional violations. Deterrence of such practices can only be accomplished by voiding the conviction. (Compare: *Mapp* v. *Ohio,* 367 U.S. 643 with *People* v. *Defore,* 242 N.Y. 13 and *Wolf* v. *Colorado,* 338 U.S. 25, 28).

POINT V

The petitioner had never previously been convicted of any crime. Yet at trial, the prosecutor seriously prejudiced his rights to a fair trial by eliciting evidence of another unproved crime which was not charged in the indictment.

It was prejudicial and unfair for the prosecutor to adduce evidence of another crime not charged in the indictment herein, since it only served to prejudice the jury and the court.

Over vehement objection of defense counsel and upon admonition of the Judge that the government was courting error, the prosecutor asked Scandifia about 100 counterfeit IT&T bonds. (G. App. 109a-111a)

No possible purpose could be accomplished since no proof was offered and no conviction had been obtained.

In *United States* v. *Modern Reed & Rattan Co.* (2 Cir. 1947), 159 F. 2d 656, cert. denied 331 U.S. 831, this court said (at 658 of 159 F. 2d):

> "The general rule applicable to them is that evidence of the commission of a wholly separate and independent crime, even though of the same nature is not admissible."

This in *Modern Reed & Rattan Co.* was held to be error even though *no objection* was voiced.

Accord:

Wilborg v. *United States,* 163 U.S. 632;
United States v. *Atkinson,* 297 U.S. 157;
Gomila v. *United States* (5th Cir.), 146 F. 2d 372.

This was not even a "crime", but merely referred to an indictment where the presumption of innocence still attaches, despite the contrary belief of the prosecutor. No instruction or the like was sufficient to eradicate this prejudice.

See:

United States v. *Tomaiolo, supra.*

This error was repeated at sentence too where the prosecutor adverted to many unproved accusations as if they were "crimes". This was grossly unfair. It was akin to an **"attainder."** Scandifia was denied bail on these improper, unproved accusations.

While this may not be a truly "legislative act" it is nevertheless akin to a bill of "pains and penalties" (bill of attainder) in violation of Article I Section 9 of the U.S. Constitution.

A bill of Pains and Penalties is ordinarily a legislative act without a judicial trial, which imposes a penalty less than death. Such bills are within the constitutional prohibition against Bills of Attainder. (*Drehman* v. *Stifle,* 8 Wall. 595, 601; 16A C.J.S. Const. Law. §§ 452, 455).

ss: *United States* v. *Lovett,* 328 U.S. 303, 322;
Cummings v. *Missouri,* 4 Wall. 277, 320 (1866);
Pannell v. *United States,* 320 F.2d 698 (D.C. Cir. 1963);
Rule 46(a) (2) F .R. Crim. P.;
Caleb Foote—The Coming Constitutional Crisis in Bail, 113 U. Pa. L.Rev. 960 (1965).

In *Cummings* v. *Missouri, supra,* the Court noted at 4 Wall. 320:

> "The deprivation of any rights, civil or political previously enjoyed, may be punishment, the circumstances attending and the causes of the deprivation determining this fact."

CONCLUSION

The writ of certiorari should be granted because of the important questions raised herein.

Respectfully submitted,

IRVING ANOLIK
Attorney for Petitioner

APPENDIX

Opinion

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 246—September Term, 1967.

(Argued January 5, 1968 Decided January 31, 1968.)

Docket No. 31705

UNITED STATES OF AMERICA,

Appellee,

—v.—

MICHAEL J. SCANDIFIA,

Appellant.

Before:

MOORE, FRIENDLY and KAUFMAN,

Circuit Judges.

Appeal from a judgment of conviction in the United States District Court for the Southern District of New York before Judge Charles H. Tenney and a jury, for wilfully causing the interstate transportation of counterfeit securities in violation of 18 U. S. C. §§2314 and 2.

Affirmed.

ELKAN ABRAMOWITZ, Assistant United States Attorney, New York, N. Y. (Robert M. Morgenthau, United States Attorney, Michael S. Fawer, Assistant United States Attorney, of counsel), *for appellee.*

Appendix

H. ELLIOT WALES, New York, N. Y. (Abraham H. Brodsky, of counsel), *for appellant.*

KAUFMAN, *Circuit Judge:*

The question presented on this appeal is whether the defendant Michael J. Scandifia "wilfully caused" the interstate transportation of counterfeit securities in violation of Title 18, United States Code, Sections 2314 and 2.[1]

The indictment, filed on September 30, 1965, was in 11 counts, each of which charged that on a specific day, between November 11, 1960 and November 30 of that year, Scandifia caused the interstate transportation of counterfeit Shell Union Oil Corporation bonds between New York City and Monmouth County, New Jersey. Following a mistrial because the jury was unable to reach a verdict, a second trial was held before Judge Tenney and a jury. Scandifia was found guilty of 9 counts—2 counts having been severed at the government's request before the first trial—and was sentenced to concurrent terms of 6 years'

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[1] 18 U.S.C. §2314 provides:

* * * * *

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities or tax stamps, knowing the same to have been falsely made, forged, altered, or counterfeited;

* * * * *

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

18 U.S.C. §2 provides:

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

imprisonment on each count. For the reasons set forth below, we affirm.

In order to keep in focus the major question on appeal, we will first describe Scandifia's scheme as the jury might have found it viewing the facts and the inferences to be drawn therefrom in the light most favorable to the government, *United States* v. *Edwards,* 366 F. 2d 853 (2d Cir. 1966), cert. denied, sub nom. *Jakob* v. *United States,* 386 U. S. 908 (1967); *United States* v. *Kahaner,* 317 F. 2d 459 (2d Cir.), cert. denied, 375 U. S. 836 (1963); and then detail the facts relating to the individual counts.

Despite the *sparse* briefs and appendices, we glean from the record that a number of people who had invested in the Hersch Trading Company (company) were pressing to be repaid. One Morton Rosenberg, who seemed to be one of those principally responsible for financial matters, explained to Leon Hersch and Irving Cohen, his partners in the company, that he had no funds at the present time because he had invested sums of money in a Brooklyn garage owned by Scandifia. Hersch was determined to verify Rosenberg's tale and, accordingly, telephoned Scandifia, who put the lie to Rosenberg and denied flatly that the latter had invested in the garage. In any event, we discover that some time later, Hersch—with the consent of the company's investors——entered into an agreement with Scandifia for the latter's aid in collecting what Rosenberg owed. For his services, Scandifia was to receive 10 per cent of the total amount due and was given a deposit of 1 per cent in advance. His inability to collect the debts did not exhaust his resourcefulness or deter him from turning this failure into a venture in his own behalf. Despite the news that

even he could not get blood from a stone, he presented an appealing plan whereby the investors could obtain ready cash while he continued to pressure Rosenberg. And so, at a meeting at Hersch's New Jersey home in the latter part of October 1960—attended by Cohen and Jerome Lasky, Leonard Ledwitz and Sam Serkin, 3 of several investors—Scandifia exhibited to the group what purported to be legitimate Shell Union Oil bonds. He refused to explain how he had secured them, but he did state that the purpose of the display was to assure all concerned that ultimately they would recover the monies Rosenberg owed. Indeed, he added that if the investors wanted to make more money, this was an opportunity, and explained how they could reap profits by negotiating loans with bonds as collateral.

With the hook thus baited, in early November 1960, Hersch and Scandifia met in a New York City restaurant where Scandifia explained the full details of his plan. He envisaged the investors obtaining short term loans on Scandifia's Shell Union Oil bonds. They could retain any amount they were able to borrow in excess of 60 per cent of the face value of the bonds, but 60 percent of face value was to be returned to Scandifia as his share. Scandifia went on to explain that when he succeeded in collecting the monies owed by Rosenberg, the short term loans would be paid off. In the interim, all concerned would have had the use of large sums of money even though Rosenberg's debt was uncollected.

Scandifia failed, however, to tell Hersch that the bonds were counterfeit. But Hersch was skeptical about their validity, and arranged to have them examined at a bank

in the vicinity. The bank, failing to detect the counterfeit, informed Hersch that they were acceptable as collateral for a loan. Hersch's concern thus alleviated, he agreed to cooperate in the execution of Scandifia's plan.

Accordingly, counterfeit bonds, having a face value of $410,000, were pledged at various unsuspecting banks in New York and New Jersey during November 1960. Scandifia received over $168,000 as his share of the loans before it was discovered that the bonds were counterfeit.

The circumstances under which the bonds were transported between New York and New Jersey vary. Accordingly, they will be described separately.[2]

The Aaron Starr Transaction—Count Three. The first loan was successfully negotiated at a Brooklyn bank on November 9, 1960 to the delight of all concerned. On November 12, Scandifia gave Hersch 30 bonds for Aaron Starr, one of the investors who lived in Freehold, New Jersey. Hersch, who also lived in New Jersey, drove out to Starr's home to show him the bonds and to explain the plan. Starr found the plan acceptable and on November 14 the two men drove to New York City where Starr obtained a loan from a local bank by pledging the 30 bonds. The bonds were in the trunk of the car during the trip from New Jersey to New York. Count three charged Scandifia with having caused the transportation of these bonds to New York.

Leonard Ledwitz Transactions—Counts Two, Four, Nine and Eleven. Hersch gave Scandifia his share of the Starr loan, and received in return 20 bonds for Ledwitz, who

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[2] Those transactions that were not the basis of Scandifia's conviction will be discussed.

lived in New Jersey. Scandifia had met Ledwitz at a previous conference in Hersch's home. On November 14, Hersch took these bonds from New York City to Ledwitz' home (count two) and 2 days later Hersch and Ledwitz returned to New York with the bonds at which time Ledwitz negotiated a loan (count four).[3] Several days later, Ledwitz asked Hersch for more bonds. Hersch relayed the request to Scandifia, who gave him 30 additional bonds. Once again Hersch took them to New Jersey (count nine), but Ledwitz never made use of them.

The various parties had arranged to meet at Hersch's New Jersey home on November 30. Prior to the meeting, however, Ledwitz told Hersch that his bank claimed that the bonds were counterfeit. Acting under instructions from Scandifia, Hersch advised Ledwitz to bring his remaining bonds to the meeting. At this gathering Ledwitz insisted that he wanted his money back; Scandifia assured him he would have it within a day or two. Ledwitz then returned the bonds to Scandifia who left with them, stating that he was going to New York to make arrangements for the return of the money (count eleven).

The Solomon Rabstein Transactions—Counts Five, Six, Seven and Ten. Sometime earlier, Hersch had spoken to another investor who had been at the first meeting at Hersch's home, one Sam Serkin, who agreed to obtain a loan on 50 bonds. Following the familiar pattern, Scandifia gave Hersch the bonds and Hersch took them to Serkin at his New Jersey office. On November 21, Serkin attempted

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[3] The indictment appears to have taken November 13 as the date of the second count. Scandifia does not claim to have been prejudiced by the variance.

to pledge the bonds, but was unable to negotiate a loan on satisfactory terms. He then suggested that the bonds be turned over to Solomon Rabstein, a creditor of his who might be able to arrange better terms.[4] Hersch agreed, but Rabstein insisted on having the bonds examined in New York at the Irving Trust Company, the trust agent for Shell Union Oil bonds. On November 23, he and Hersch took the bonds to New York (count five); the bank failed to detect that the bonds were counterfeit. Hersch and Rabstein then returned to New Jersey where Rabstein negotiated a loan (count six). Later that evening, Hersch telephoned Scandifia in Brooklyn and told him that since nighttime was approaching he did not want to drive to Brooklyn (in order to deliver his share of the Rabstein loan). Scandifiia agreed to come to New Jersey and a meeting was arranged at a restaurant close to South Amboy. On that occasion Scandifia received his share of the Rabstein loan and turned over 100 more bonds to Hersch.[5] On November 25, Hersch gave these bonds to Rabstein who, still dubious over dealings which seemed too good to be true, insisted that they go to New York to have the bonds examined again. The bonds were taken to New York (count seven), and this time the trip bore fruit for the counterfeit was discovered by the American Bank Note Company, the printer of the genuine Shell bonds.

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[4] Scandifia claims that Rabstein was a total stranger to him. But both Rabstein and Scandifia testified to being present at a meeting at Scandifia's garage which, as we read the record, took place prior to the Rabstein loan.

[5] For reasons unknown to us, Scandifia was not indicted for having himself transported these bonds in interstate commerce from New York to South Amboy.

Hersch promptly informed Scandifia of Rabstein's discovery and a meeting was arranged in Brooklyn. For obvious reasons, the discussion was heated. Rabstein threatened to go to the police if his money was not returned, and refused to release to Scandifia the bonds still in his possession. Scandifia, however, took them by force, but agreed to return his share of the Rabstein loan. Several hours later, Scandifia gave this money to Hersch, but told him not to give it to Rabstein until the bonds Rabstein had pledged were redeemed. On November 28, the bonds were redeemed and Hersch turned the money over to Rabstein. Hersch then telephoned Scandifia and was told "to come into New York and give him [Scandifia] the bonds"; he performed as instructed (count ten).

Other than the money thus returned to Rabstein, no part of Scandifia's share of the other loans negotiated through the use of the Shell bonds was ever recovered from him.

With these tortuous facts in mind, we turn to the points raised on this appeal. Scandifia testified in his own defense and denied any participation in or knowledge of a scheme to obtain loans on Shell Union Oil bonds. Indeed, while he admitted acquaintance with the *dramatis personae,* he claimed never to have seen a bond or security certificate before the commencement of the instant proceedings. Thus, the basic factual issue before the jury was clear—did they believe Scandifia or the numerous government witnesses?

The experienced and able trial judge instructed the jury that

> The statutes which the indictment charges were violated by this defendant do not require proof by the gov-

> ernment of knowledge on his part that the bonds were to be transported in interstate commerce. . . .
>
> If the defendant turned over bonds to Hersch or to some other person without limitation as to where they were to be transported, and if in fact thereafter the bonds were transported in interstate commerce, then the jury might properly find that the defendant caused their transportation in interstate commerce.

While counsel strenuously objects on appeal to this instruction, no objection was noted at the trial and no other instruction was requested. Under these circumstances, Scandifia may not now challenge these instructions. See Fed. Rules Crim. Proc. 30; *Lopez* v. *United States,* 373 U. S. 427, 436 (1963). Cf. *United States* v. *Indiviglio,* 352 F. 2d 276 (2d Cir. 1965) (*en banc*), cert. denied, 383 U. S. 907 (1966). Nor does the doctrine of "plain error" save the day for Scandifia. Any alleged error in the charge did not seriously prejudice the defendant or affect the fairness or integrity of the trial so that a mistrial or miscarriage of justice would result unless we recognized that the trial judge had committed "plain error." See Fed. Rules Civ. Proc. 52(b); *United States* v. *Minieri,* 303 F. 2d 550 (2d Cir. 1962) cert. denied, 371 U. S. 847 (1962); *United States* v. *Frascone,* 299 F. 2d 824 (2d Cir. 1962) cert. denied, 370 U. S. 910 (1962); *United States* v. *Sansone,* 231 F. 2d 887 (2d Cir.) cert. denied, 351 U. S. 987 (1956). We have already noted that Scandifia claimed that he never (1) gave Hersch or anyone else any bonds, (2) caused their interstate transportation, or (3) participated in any loan of the transaction involved in this case. The jury believed

the government's witnesses and obviously found Scandifia's testimony incredible. Moreover, we cannot perceive any consideration of the evidence which could lead the jury to conclude that Scandifia gave the bonds to Hersch but did not "cause" their movement in interstate transportation, as the term is interpreted by the cases.

The question remains, however, whether there was sufficient evidence to support the jury's finding that Scandifia was the "cause" of the interstate transportation of the counterfeit securities. The basic difficulty encountered when considering causation is that "[t]o consequences no limit can be set." Hart & Honoré, Causation in the Law 64 (1959). Thus, "the consequences of the simplest act may be traced over an ever-widening canvas with the passage of time." *Petition of Kinsman Transit Company,* —— F. 2d —— (2d Cir. 1968). Every enlightened system of jurisprudence, therefore, must have rules or guidelines to determine when a person will no longer be held responsible for a result "caused in fact" by his act or omission.

In the instant case, Scandifia clearly was a cause in fact of the counterfeit bonds entering the stream of interstate commerce; had he not provided Hersch and the investors with the Shell bonds, they would not have transported with the Shell bonds, they would not have transported them between New York and New Jersey. It is also true that Scandifia is not insulated from criminal responsibility merely because the result which the law condemns was achieved through the actions of innocent intermediaries. See, e.g., *United States* v. *Giles,* 300 U. S. 41 (1937); *United States* v. *Weisman,* 83 F. 2d 470 (2d Cir.) cert. denied, 299 U. S. 560 (1936). See also Hart & Honoré, *supra,* Ch. XIII.

The government argues, however, that the evidence was sufficient to support the conviction because it establishes that Scandifia gave the bonds to Hersch "without any limitation as to where he [Hersch] could take them to have the loans negotiated," and that the bonds were thereafter transported in interstate commerce. We would hesitate to endorse the principle that a causal relationship could be found here merely because the interstate transportation was not in any way inconsistent with Scandifia's instructions and redounded to his benefit. In the absence of some evidence that Scandifia intended, knew, or could have reasonably foreseen that the innocent persons to whom he entrusted the bonds would take them across state lines, we question whether the jury would have been justified in concluding that he did more than provide others with the opportunity to do that which the law forbids. And, to provide an opportunity would not seem *ipso facto* to brand one as the causer. Compare Hart & Honoré, *supra*, 48-57. Moreover, the causer as a principal has been eliminated from 18 U. S. C. §2314, and since the 1951 amendment, 18 U. S. C. §2(b) has required that the defendant *wilfully* cause the forbidden act to be done.

In any event, we need not decide the question posed by the government, because we find that the interstate transportation in this case was a reasonably foreseeable consequence of Scandifia's actions. There can be no doubt that a defendant may be found to be a "cause" if the result which the law forbids was reasonably foreseeable. In *United States* v. *Kenofskey*, 243 U. S. 440, 443 (1917), the Supreme Court noted with respect to another statute posing causal difficulties that "cause" is used in its well-known sense of

"bringing about." We stated in *United States* v. *Weisman, supra,* 83 F. 2d at 473, when presented with a comparable problem, that "[i]t has long been settled that a defendant may cause a letter to be sent or delivered by mail though such a mode of transportation was neither known nor intended, provided mailing or delivery by post might reasonably have been foreseen." Compare *Wapnick* v. *United States,* 355 F. 2d 136 (2d Cir. 1966).

With these principles in mind, we affirm Scandifia's conviction. Scandifia knew that Hersch and those to whom Hersch was transferring the bonds often had occasion to be in New Jersey. Indeed, very early in the saga Scandifia met Hersch and Ledwitz at a New Jersey restaurant and again in late October he attended a meeting at Hersch's New Jersey home at which a number of the investors were present. It appears that it was at this meeting that he first broached the subject of using the bonds in order to secure loans. Moreover, as we have already noted, Scandifia personally delivered 100 bonds to Hersch in South Amboy, New Jersey, after the Rabstein loan was negotiated. We have little difficulty, therefore, in concluding that Scandifia could reasonably have foreseen that the Shell bonds would be taken across state lines.

In addition, as to count ten, the evidence disclosed that Scandifia told Hersch "to come into New York and give him the bonds," and, with respect to count eleven, that Scandifia left a meeting in New Jersey with the bonds in his possession and stated specifically that he was going to New York. There is little doubt that the jury could properly infer that he actually went where he declared he in-

tended to go.[6] It follows that Scandifia should reasonably have foreseen the interstate transportation charged in these 2 counts. Indeed, an inference of actual knowledge on his part would not be unreasonable. Under these circumstances, it hardly distorts the practical or fair meaning of the term to conclude that Scandifia was the "cause" of the transportation.

Having made this determination with respect to counts ten and eleven, we need not consider the causation question raised by the other counts, since the trial judge imposed concurrent sentences on all counts. See *Lawn* v. *United States,* 355 U. S. 339 (1958); *United States* v. *Romano,* 382 U. S. 136 (1965); *United States* v. *Gainey,* 380 U. S. 63 (1965); *United States* v. *Gonzales,* 379 F. 2d 285 (2d Cir. 1967) (*per curiam*); *United States* v. *Orza,* 320 F. 2d 574 (2d Cir. 1963).[7]

Only one other point raised by Scandifia merits discussion. During the cross-examination of Irving Cohen, defense counsel brought out that Cohen originally had told agents of the Federal Bureau of Investigation that he had

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[6] Scandifia insists that because the indictment charged only that he "caused" the transportation he cannot be found guilty for having transported the bonds himself. It seems specious to argue that one who brings about a result directly cannot be fairly said to have caused that result. In any event, Scandifia made no claim of prejudice resulting from the variance and we find no fatal variance.

[7] Scandifia's culpability and participation in the illegal venture is clear and would be unaffected by whether he was technically a "cause" of the interstate transportation as charged in each count. And, there is nothing in the record to suggest that Scandifia received a longer sentence because he was found guilty on 9 counts. See *United States* v. *Bottone,* 365 F. 2d 389, 394 (2d Cir.), cert. denied, 385 U. S. 974 (1966).

obtained the counterfeit bonds from a "Mr. Schweikert." Cohen had testified that he had mentioned "Schweikert" under instructions from Scandifia and, on redirect, he explained that he had obeyed because "[m]y family had received threatening phone calls. . . . [and f]or fear of my family's life, knowing Mr. Scandifia's background." Since the purpose of the cross-examination was to impeach Cohen with a prior inconsistent statement, the trial judge acted well within his discretion in permitting the government to explain away the inconsistency. See 3 Wigmore, Evidence §§1044-46 (3d ed. 1940); McCormick, Evidence §49 (1954). And if there was any prejudice to Scandifia in Cohen's answer, it was cured by the court's prompt instruction to the jury to disregard the reference to Scandifia's background.[8] See *United States* v. *Murphy*, 374 F. 2d 651, 654 (2d Cir.), cert. denied, —— U. S. —— (1967); *United States* v. *Caruso*, 358 F. 2d 184, 186 (2d Cir.), cert. denied, 385 U. S. 862 (1966).

Affirmed.

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[8] Although Cohen referred to "my family"—and not himself—as having received the threats, the testimony was admissible nevertheless, because a statement offered to show its effect on the hearer is not hearsay. See, McCormick, Evidence, *supra*, §228. Counsel did not seek an instruction limiting the purpose for which the testimony was admitted.

Order Denying Petition for Rehearing In Banc

31705

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MICHAEL JOSEPH SCANDIFIA,

Defendant-Appellant.

A petition for a rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellant and no active circuit judges having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

.....

Chief Judge
J. EDWARD LUMBARD

March 5, 1968

Order Denying Stay of Mandate

31705

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MICHAEL JOSEPH SCANDIFIA,

Defendant-Appellant.

A petition for a rehearing having been filed herein by counsel for the appellant,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

It is further ordered that the motion for a stay of mandate and admission to bail pending the filing of a petition for a writ of certiorari be and it hereby is denied.

HENRY J. FRIENDLY

IRVING R. KAUFMAN

Circuit Judges.

March 5, 1968

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

JOHN FRANZESE, also known as "Sonny," WILLIAM DAVID CRABBE, also known as "Red," JOHN MATERA, also known as "Johnny Irish," NICHOLAS POTERE and JOSEPH M. FLORIO, also known as "Whitey,"

Petitioners,

—v.—

UNITED STATES OF AMERICA,

Respondent.

JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

October Term, 1967

No.

JOHN FRANZESE, also known as "Sonny," WILLIAM DAVID CRABBE, also known as "Red," JOHN MATERA, also known as "Johnny Irish," NICHOLAS POTERE and JOSEPH M. FLORIO, also known as "Whitey,"

Petitioners,

—v.—

UNITED STATES OF AMERICA,

Respondent.

JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners, John Franzese, William David Crabbe, John Matera, Nicholas Potere and Joseph M. Florio, jointly pray that a writ of certiorari issue to review the judgment, as to each of them, of the United States Court of Appeals for the Second Circuit entered in this case on March 25, 1968 (Appendix C hereto, *infra,* pp. A28-9).

Citations to Opinions Below

The unreported opinion of the Court of Appeals, —— F. 2d ——, affirming the judgments of conviction herein is printed in Appendix A hereto, *infra,* p. A1 to p. A24.

Jurisdiction

The judgment of the Court of Appeals was entered on March 25, 1968 (Appendix C hereto, *infra*, p. A28 to p. A29).

On April 19, 1968, Mr. Justice HARLAN signed an order granting petitioners an extension of time within which to file the instant petition to and including May 24, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

Questions Presented for Review

1. Were petitioners denied a fair trial when the prosecution gave over to defense counsel an item of "3500" grand jury testimony which testimony, unbeknownst to the defense, had been coached by the prosecution to omit any reference therein that the Government witness in question feared the petitioners? Having thus tampered with, influenced, and limited the grand jury testimony of a Government witness regarding the element of fear, was it not unfair for the prosecutor to attempt to rehabilitate that witness at the instant trial by eliciting testimony from him that his contradictory statements in a previous trial were caused by fear of the petitioners as members of organized crime? Were not defense counsel prejudicially misled by the production of the aforesaid "3500" grand jury material consciously omitting any reference to the concept of fear, and was not the defense thereby invited to cross-examine the Government's witness without having to risk his rehabilitation through explanations offering fear as the reason for his prior inconsistent testimony? In the situa-

tion presented, should not the Government have been estopped to claim fear of the petitioners as a basis for prior contradictory testimony? At the very least, should not the Government have been required on this turnover to have forewarned defense counsel that the grand jury testimony in question had been deliberately coached so that no reference to the issue of fear of petitioners or their alleged connections with organized crime was made therein?

2. Were petitioners denied due process and the right of confrontation when Government witnesses, in the course of their rehabilitation, were permitted to testify that, owing to alleged representations made to them by third persons, they feared petitioners because of petitioners' alleged rank and power in the world of organized crime? Was not the vice of such testimony intensified where that testimony was completely unexplicated by any verifiable or tangible instance of injury or threat?

3. Whether the admission of

(a) evidence of a conspiracy of silence and concealment in return for aid to arrested defendants and their families, which was not charged in the indictment, and

(b) evidence of this uncharged conspiracy's existence at least a month after the termination of the 11-week period charged in the indictment,

so enlarged the scope and duration of the conspiracy as to constitute, separately or jointly, a variance between indictment and proof in violation of the Fifth and Sixth Amendments and Fed. R. Crim. P. 7(c).

4. Were the petitioners denied a fair trial by reason of the court's refusal to allow the defense to ascertain the identity of the informants who named Mrs. Cordero as a participant in the robberies?

5. Was the arrangement entered into between the Government and its witnesses respecting the considerations to be afforded in exchange for their testimony inculpating the petitioners so offensive to concepts of due process and a fair trial that the judgments of conviction should be set aside under the supervisory power of this Court?

6. Whether the Court of Appeals should have affirmed the judgments of conviction absent authoritative certification from the Department of Justice that no Government personnel engaged in or obtained any evidence or lead from any incident of electronic eavesdropping involving conversations by or relating to any of the defendants?

Constitutional Provisions and Statutes Involved

This case involves the Fifth Amendment due process clause; the Sixth Amendment right of an accused to be confronted with the witnesses against him; and Title 18 U.S. Code §3500 requiring the production of statements and reports of witnesses. With regard to the crimes charged against the petitioners in the indictment, the relevant statutory provisions are: Title 18 U.S. Code §2 (aiding and abetting), §371 (conspiracy) and §2113 (bank robbery and incidental crimes). These Constitutional and statutory provisions are quoted in Appendix D, hereto, *infra,* pp. A30 et seq.

Statement of the Case

The petitioners were charged in eight counts with crimes relating to the robbery of two federally insured banks in the New York City area, the receiving of proceeds of a bank robbery committed in Salt Lake City, and conspiracy. Proof in connection with these charges emanated from four Government witnesses who were themselves actual participants in some, or all, of these robberies.

The proof established that in the Fall of 1965, the Government's four bank-robber witnesses—ex-convicts and admitted bankrobbers by profession—were arrested by agents of the Federal Bureau of Investigation as a result of information supplied by informers and various eye-witnesses to the recently executed bank robberies. In the four months prior to their apprehension, they had terrorized banks in New York, Connecticut, Colorado and Nevada and on each occasion employed loaded weapons, disguises, get-away-cars, so called "switch cars" and various other sophisticated paraphernalia of crime utilized to escape identification and apprehension. Each of the four bandits, prior to arrest, had spent a substantial part of his life working at crime, and three of them had spent a substantial number of years, both as a youth and as an adult, in prison. While none of these bandits was much more than thirty years of age, the history of the quartet, as shown by their criminal records, correspondence and hospital records, revealed a commitment to violence, drugs, sadism and related forms of depravity.

All of the bandits had only recently emerged from prison and had joined together as hold-up specialists concentrating mainly on banks. They had chosen as their center of operations a Queens County (New York City) motel at

which premises they had secreted pistols, machine guns, ammunition and stolen vehicles to be used in connection with projected robberies.

The proof established—and the Government has conceded—that none of the petitioners herein was ever present at or near any of the robberies disclosed by the evidence. In this connection, the theory of the Government's case was that the petitioners were participants in the crimes charged only in the sense that they had planned the robberies and later shared in the proceeds actually stolen by the holdup men, Smith, Parks, Cordero and Zaher.

The Government's proof established that the robberies for which the petitioners were convicted were planned and executed during the period running from approximately mid-June, 1965 to on or about September 13, 1965. On September 30, 1965, three of the robbers—Smith, Parks and Cordero—were apprehended by federal agents. A few days later, the fourth member of the hold-up team, Zaher, was also apprehended. At first, each of the bank robbers denied complicity in any of the crimes charged. By reason of intensive interrogation, the gunmen, in stages, ultimately pictured for the authorities a variety of conflicting stories implicating themselves and others. However, at no time in the course of all of this preliminary and resultant investigation did any of the robbery principals implicate the petitioners herein.

The disclosures made by the robbery team describe three distinct stages of development. These stages clearly disclose the means by which each robber adjusted and dovetailed his story in order to earn special consideration from the Government as it became apparent that one or the

other of his colleagues in crime had achieved promises of Government favor more auspicious than his own. In this connection the record will reveal the following history of events:

The first robber to succumb to governmental persuasion was John Cordero whose statements to the authorities made it clear that the robberies in question were entirely attributable to himself and his aforementioned confederates, Smith, Parks and Zaher. In his story, Cordero recounted that the weapons used to commit the robberies had been cached at the Queens motel in a secret hiding place tended by the owner of the motel, Anthony Polisi. In Cordero's words, Anthony Polisi received small allowances, from time to time, for the safekeeping of the weapons—but was not himself a participant either in the planning or the execution of bank robberies.

When the news of Cordero's disclosures was made known to the other bank robbers, these three came forward with a new tale similarly—and admittedly—aimed at guaranteeing the good offices of the government in connection with their own plight. Accordingly, and in an effort to better the story given by Cordero, the three foisted upon the aforementioned Anthony Polisi the role of mastermind and technical director of the bank robberies, and also assigned to Polisi's young son, Salvatore, the role of occasional lookout. By virtue of this information, a grand jury sitting in the Eastern District of New York returned a spate of indictments separately charging the four bank robbers as defendants in connection with individual bank robberies and further separately charging Anthony and Salvatore Polisi in accordance with the information divulged by three of the four bank robbers.

Armed with this "evidence", the United States Attorney brought both Polisis to trial in January, 1966, upon charges of bank robbery and conspiracy. During this trial, the bank robber Cordero—who had relegated the senior Polisi in his FBI statements to the minor, if not innocuous, role of storer or guardian of weapons—was never called as a government witness. Upon the testimony of Cordero's confederates, however, both Polisis were convicted. The senior Polisi received a sentence of fifteen years imprisonment based upon his status as "mastermind" of the robberies. The younger Polisi was sentenced to a four year term of imprisonment.

As the Polisi trial neared its end, it became apparent to Cordero that he would not be called as a Government witness at that trial, owing to the fact that his pre-trial statements conflicted with the trial testimony and extra-judicial statements of Smith, Parks and Zaher. Overcome by the spectre of being excluded from Government consideration by virtue of this conflict in stories—rendering his testimony valueless—if not downright dangerous to the prosecution, he sought out the prosecutor and with the connivance of his erstwhile confederates—who likewise wished not to be outdone—delivered over to the United States Attorney a new tale, now transferring responsibility from themselves and the Polisis to the petitioner Franzese and the other petitioners named herein. With this information in hand, the prosecutor in charge of this and the related Polisi cases procured the instant indictment in April, 1966.

The convictions of the Polisis were affirmed in November, 1966, without the prosecutor advising the Court of Appeals of the new developments in the case which drastically revised the nature of the alleged conspiracy and the role therein of the senior Polisi.

Smith's Rehabilitation, His Testimony Concerning Fear of the Petitioners, and the Depiction of Petitioners as Members of Organized Crime (Questions 1 and 2, *supra*)

Petitioners were indicted in April 1966 by a grand jury sitting in the Eastern District of New York. The filing of this indictment very quickly became the occasion for a glut of newspaper coverage reaching far beyond a simple and straightforward disclosure of the criminal charges which had been returned. The identification and naming of petitioner Franzese as the alleged mastermind of a string of local, and out-of-state, bank robberies became the starting point for a torrent of lurid stories attributing to him senior status in the ranks of the Cosa Nostra and further describing him as a seasoned killer who had successfully "muscled" his way into an assortment of Long Island criminal enterprises suspected by law enforcement to operate only with so-called "mob" approval. Against this background, the attempt to select an impartial jury in Brooklyn was rendered futile. Inflammatory articles printed in local papers including the venerable New York Times, cast the petitioners into the role of Mafia gunmen. In order to escape a rising tide of newspaper and radio publicity fostering this terrible image, the petitioners sought, and were granted, in the midst of selecting a jury in Brooklyn, a mistrial and change of venue.*

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* During the voir dire in Brooklyn relating to the selection of jurors, the Times reporter wrote an article disclosing Franzese's alleged status as a "boss" in the Mafia or Cosa Nostra. The article was published notwithstanding the Court's specific request to this reporter to avoid such reportage. Following the publication of the offending and prejudicial account by the Times man, Judge MISHLER excoriated this reporter by stating, ". . . Mr. Anderson . . . I just think what you did to this case is unforgiveable" (5377; see also 5371 *et seq.*). The Court subsequently granted a mistrial and change of venue (5400-1).**

**References are to the typewritten pages of the original record which has been certified and filed in this Court.

Thus—and most ironically—it was that petitioners and their counsel journeyed, upon the change in venue, to distant Albany only there to be exposed to rulings of the trial court which permitted the witness Smith and his bank-robber colleagues to nonetheless depict the petitioners as important and menacing operatives of organized crime.

In connection with the foregoing, it will be recalled, that in January, 1966 the Government's witnesses Smith, Parks and Zaher testified at the trial of Anthony Polisi and Salvatore Polisi denominating the senior Polisi as their bank-robbery overlord and attributing to him the genius and control of the entire operation. In March, 1966, following the conviction of the Polisis, Smith testified before a new grand jury there transferring the onus of the robbery ring's generalship to Franzese and his co-petitioners herein. At the same time, the Polisis were assigned minor roles in the crime enterprise. In that grand jury testimony Smith identified for the first time the petitioners herein as accomplices, receivers and bank robbery co-conspirators. The relevant portion of this grand jury testimony of Smith's is as follows (see pp. 845, *et seq.* and exh. 21 for id., p. 29):

> "Q. You have testified at a bank robbery trial already, is that right? A. Yes.
>
> Q. That was the case of the United States versus Salvatore and Anthony Polisi? A. Right.
>
> Q. Did you disclose any of this information to the federal government up to that time? A. No.
>
> Q. Why not? A. Because, as far as I was concerned, I was ready to go and take my just punishment. They would look out for my family and put up the bail money, and try and get me back out. And they just didn't do it, you know, they forgot all about it. And I felt I didn't owe them nothing no more."

Upon the conclusion of Smith's direct examination at the trial herein, his March, 1966 grand jury testimony, part of which is set out directly above, was turned over to defense counsel pursuant to Title 18 U.S.C. 3500. Upon this turnover, no forewarning was given to the defense that the testimony above quoted was falsely given pursuant to the direction of the United States Attorney in charge of the prosecution of this case. Defense counsel were thus supplied with the most recent and presumably candid explanation of Smith's failure to have previously identified petitioners as his robbery cohorts. It will be seen, that in the grand jury minutes quoted above not a word is said by Smith to the grand jury panel that he ever feared the petitioners. Indeed, Smith's expressed reason to the panel for then inculpating the petitioners was that promises of bail monies, lawyers' fees and support for relatives had never been furnished; that this constituted a breach of faith by the petitioners, and that by reason of their failure to stand by the claimed promises, Smith no longer felt a duty to protect the petitioners from discovery.

The specific delimitation by Smith in his March, 1966 grand jury testimony of his reasons for so lately inculpating the petitioners foreshadowed no reasonable risk that following his vigorous cross-examination, any attempt could be properly made to rehabilitate him by showing—as a completely different reason for his failure to initially inculpate the petitioners—that he was in mortal fear of them. Despite this fact, the trial court subsequently allowed redirect examination of Smith which produced testimony on his part excusing his contradictory testimony at the Polisi trial as having been generated by fear of the petitioners and their organized crime associates both in and out of

jail (1042, *et seq.*). Defense counsels' numerous and continuing objections to this fatal line of "fear" testimony depicting petitioners as Mafia overlords were to no avail. They did, however, produce a significant and shocking admission from the prosecutor to the effect that he had deliberately instructed the witness Smith prior to his March, 1966 grand jury testimony, to omit any reference to Smith's alleged fear of the petitioners as a reason for his tardy revelation of their complicity. Thus, the prosecutor advised the Court (1407-8):

> "Mr. Gillen: What this is, Your Honor, prior to these individuals—I make it a practice not only testifying before the Grand Jury but testifying in Federal Court, this statement that fear is a very critical thing, and I had a conversation with each of these individuals before they went into that Grand Jury and said 'Don't mention this organized crime in there; don't mention this killing business; don't mention the fear element.' and the same when these people had been put on the stand. That is the reason for this."

Once the Court had ruled that Smith could testify concerning his fear of the petitioners, the record was laid open for infection by substantial doses of general and hearsay testimony recounting Smith's fearful state of mind. In this connection, Smith's reportage generally depicted the petitioners as persons having associates "both in and out of prison" (1049) and otherwise indicated to the jury that he knew of circumstances where "these people . . . and conspiracies" had successfully carried out threats against informants, like himself, who were in jail. In addition, Smith recounted that various third persons had advised him during the period of his incarceration that his life would be in danger if he ever testified against the petitioners. With re-

spect to all of the foregoing testimony, the Government introduced not a whit of independent corroborative proof establishing an objective or verifiable basis for the witness' claimed fears. Regarding this, the trial court observed that it made no difference whether Smith's view of his own safety was predicated on any facts having objective reality (827) and, the court further stated that it was "immaterial whether or not" the concededly hearsay information which Smith might have been receiving in jail as regards the petitioners, was true or not (886). In this unique fashion the trial court dispensed entirely with any need for the prosecution to show preliminarily the slightest objective verification of the alleged facts urged by Smith as the basis underlying his claimed fears.

Variance Between the Indictment and the Proof Respecting the Scope of the Conspiracy (Question 3, *supra*)

The indictment alleged seven substantive counts of bank robbery and receiving [under 18 U.S.C. §2113(a), (c) and (d)] and in count VIII a conspiracy (18 U.S.C. § 371) to commit those crimes running from "on or about and between the 15th day of July 1965 and the 30th day of September 1965, both dates being approximate and inclusive. . . ." In neither the 35 overt acts alleged in the indictment nor the several bills of particulars submitted before trial did the Government suggest (a) that there was a conspiracy among the defendants to conceal the robberies and keep silence in return for bail money, lawyer's fees and money for arrested defendants' families, or (b) that both the conspiracy charged in the indictment and the second conspiracy just described continued beyond the indictment's September 30th termination date until at least the middle of No-

vember. Over repeated objections by defendants (*e.g.*, 1466-73), the Government introduced evidence which tended to show, in the prosecutor's own words, that this was "not the normal conspiracy . . . just to rob banks. . . . [H]ere, the very part [*sic*] heart of the conspiracy . . . is the conspiratorial agreement to give bail money and money for attorneys fees in return for silence and lack of information against the other conspirators . . ." (3241). Virtually the only evidence at trial not from the mouths of accomplices was the testimony of 2 lawyers, and that came in as proof of this second conspiracy and showed that it continued well into November and even December (*E.g.*, 2648-95; 2785-96). This evidence was *not* admitted as proof of acts in furtherance or corroborative of the conspiracy charged in the indictment, but solely as proof of a different conspiracy. The trial court charged the jury that despite the general principle that a conspiracy terminates when the principal objective is accomplished, since here there was proof of a conspiracy to aid arrested prisoners in return for their silence, the jury could bring in a verdict on the basis of that conspiracy and of evidence of its existence for a month after the September 30th indictment date (4142-3, 4149, 4150).

The Court's Refusal To Divulge the Identity of the Informant Who Had Named Mrs. Cordero As a Participant in the Robberies (Question 4, *supra*)

During the trial, the defense came into the possession of an affidavit sworn to by Special Agent Murphy of the FBI. Agent Murphy's affidavit had been submitted pursuant to an FBI application to the United States Commissioner of the Eastern District of New York for warrants of arrest for James Smith, John Cordero and Mrs. John Cordero. The Murphy affidavit described Mrs. Cordero as a principal in

at least two of the robberies charged in the indictment and related that a

> "prior reliable informant [advised] that the said Mrs. John Joseph Cordero was a driver of the car used in the [Oceanside] bank robbery on August 13, 1965."

The Murphy affidavit additionally advised that the same "prior reliable informant who had given him information in connection with the Oceanside robbery" had also given information that Mrs. Cordero's automobile had been used in the robbery of the County Federal Savings & Loan Association on June 17, 1965.

In their testimony at the trial, the bank-robbers had given substantial testimony to the effect that in the County Federal and Oceanside robberies the get-away driver was Anne Messineo and that, in each instance, the so called get-away car was a stolen vehicle. The affidavit of Agent Murphy gave considerable substance to the defense claim that Mrs. Cordero was a participant in the holdups. Cordero himself had communicated this fact before the trial to various FBI Agents. The likelihood of Mrs. Cordero's participation in the holdups was also heightened by the fact that she had been present in the vicinity of the Oceanside, Holyoke, Denver and Salt Lake City robberies when they occurred. Notwithstanding the attempts of counsel to establish her complicity, the robbers steadfastly denied her participation in the holdups.

Against the background of the foregoing testimony, the affidavit of Agent Murphy supplied the defense with a truly important vista regarding Mrs. Cordero's involvement in the robberies and the possibility of showing that all of

the gunmen, while confined in jail, had combined to form a perjury conspiracy.

More importantly, the jury had learned that Mrs. Cordero had received $10,000 originally seized from her household in connection with her, and her husband's, arrest on October 1, 1965. The return of those monies to Mrs. Cordero, with the consent of the United States Government and by order of the court, was tantamount to instructing the jury that Mrs. Cordero was innocent of any and all wrong-doing. That necessary implication, drawn from the return of the monies, seriously undermined the defense accusation that the gunmen and their women had combined in a plot to shift all responsibility to innocent persons. It was all important, therefore, that Mrs. Cordero's role in the robberies should have been fully explicated by any and all extrinsic evidence of her guilt which might have been available. Over objection of all of the petitioners, the court denied their application to have the identity of the informant or informants mentioned in the Murphy affidavit divulged. (3344, et seq.)

Concerning the Promissory and Financial Relationship Established Between the Government and its Witnesses (Question 5)

At the trial, on the conclusion of the direct testimony of each of the robbery witnesses, the Government turned over voluminous materials—mostly in the form of correspondence—indicating the extent to which the Government witnesses had taken control of the prosecution. In these papers, there is set forth in shocking detail recurrent reference to the "deal" which the witnesses were to be afforded in consideration for their testimony. Their correspondence with the United States attorney reveals not

only a particularized understanding that their testimony would earn them their freedom, but that if were they to be deprived of preferential conditions in jail living, they would quickly leave the Government without a case. In addition, the letters written by the Government's witnesses to the United States Attorney portray unbelievable arrogance, contempt and satisfaction in the knowledge of their value as witnesses in the Government's case.

It is against this background that one can readily understand the underlying reason for the special considerations afforded to the bank-robbery quartet while in prison and the ease with which they were able to demand and effect transfers from one federal facility to another. Beyond this, the record discloses that prior to the instant trial, the Government consented to the return of approximately $10,000. which had been taken by the F.B.I. from a suitcase found in the home of the Corderos. It was established at the trial that these monies were proceeds of the Salt Lake City robbery as certain serial numbers on bills seized corresponded with those recorded by the bank for security purposes. The return of these monies to Mrs. Cordero was allowed even though the F.B.I. was in possession of information from multiple sources indicating that Mrs. Cordero had actually been a participant in some of the robberies.

It was also established in various "3500" materials turned over to the defense that Cordero's bankrobber accomplices had received similar benefits from the Government. Accordingly, there was returned to Parks while he was in prison $3,500. representing the proceeds of a Cadillac sedan purchased by him shortly after one of the

robberies. He had purchased this vehicle by paying out $5,000. in cash. Similarly, Smith—who had conceded he had no legitimate means of support at any time while out of prison—was refunded the $800. value of a sedan taken from him when he was arrested.

Concerning Electronic Eavesdropping (Question 6, *supra*)

At a pretrial hearing on January 30, 1967, defense counsel informed the court they had learned of a wiretap by the New York City Police. In response to questions by the court, the Assistant United States Attorney stated that neither he nor his investigators had knowledge of the wiretap until informed at a prior related trial by other defense counsel and that the Government had "received no leads, no assistance, no evidence with any shape, manner or form from any electronic device of that type or any other type." (4946, 4950). Defense counsel did not pursue the possibility of electronic eavesdropping further.

However, in the light of intervening developments which revealed that eavesdropping was not an isolated practice and in particular of *United States* v. *Desist,* 384 F. 2d 889 (2d Cir. 1967), *cert. granted,* No. 909 October 1967 Term, 36 U.S.L.W. 3345 (March 4, 1968), where an almost identical representation by an Assistant United States Attorney proved false, petitioners made a new request for disclosure. In their brief on appeal (Franzese Brief, pp. 86-97), they requested the Department of Justice to certify after review of its files whether or not there had been any eavesdropping of which the Government had knowledge or obtained the fruits. Pending such certification, if necessary at the direction of the Court of Appeals, it was asked not to decide

the appeal. The Government refused to make any further representation concerning eavesdropping, terming petitioners' request a "bizarre" "fishing expedition." (Gov't Brief, pp. 89-90.) The Court of Appeals affirmed the convictions without such certification.

REASONS FOR GRANTING THE WRIT

I.

(Concerning Questions 1 and 2)

The instant case discloses, on the part of defense counsel, a continuing and assiduous effort to avoid the pollution of jury mentality by any reference to alleged Mafia involvement in the matter. Despite the attempts in this direction by defense counsel, which included a most expensive and disadvantageous change of venue, the Government managed to create a situation at the trial giving itself an apparent license to inject into the proceedings testimony tending to show that petitioners were important personages in the world of organized crime. The conduct pursued by the Government in achieving this result involved its wilful and deliberate direction to a witness that he testify differently from what the witness knew to be the truth. In this fashion, the witness Smith was directed by the Government to omit all reference from his grand jury testimony of the claimed fact that he was in fear of the petitioners by reason of their alleged connection and position in the ranks of organized crime. In the place of such testimony, Smith gave to the grand jury as his reason for failing previously to inculpate the petitioners a highly

vulnerable claim that they had failed to honor certain commitments to provide him with attorneys, bail and family support.

The contrived omission, at the specific behest of the Government, of any reference to the factor of fear was obviously meant to—and succeeded in—disarming the defense. By reason of the Government's controlled omission of testimony, the defense was induced to mount a conventional attack on the credibility of Smith with the apparent and seemingly well-founded assurance that the issue of fear and the alleged Mafia involvement of the petitioners could not be factors which might come into the case under the cover of witness rehabilitation. As shown above in the Statement portion of this petition, that legitimate expectation was torpedoed without warning when the trial Court gave its disastrous ruling to the contrary.

We urge this Court that in its supervisory power over the conduct of federal trials, it should not countenance prosecutorial misconduct of the sort involved here which embraced deliberate withholding of information from a grand jury and the turnover to the defense of a document (Smith's grand jury minutes) falsely purporting to be a true and authentic version of his testimony. It seems perfectly clear to us that a turnover pursuant to Title 18 U.S.C. 3500 of a statement of a witness which is known by the prosecutor to be false and designedly incomplete, on its face, is not bona fide compliance with the strictures of that statute. We further urge that the turnover of this 'counterfeit' grand jury testimony without warning to defense counsel of the highly material discrepancy relating to the issue of fear was a further act of suppression and interference with the evidence on the part of the prosecutor.

Even in the opinion of the Court of Appeals, the fundamentally offensive nature of the prosecutor's conduct is pointed out (see Appendix A, p. A14). Its prejudicial effect, however, is casually brushed aside upon the assumption that defense counsel would have proceeded the same way even had they been forwarned respecting Smith's alleged fear. Such an argument on the part of the Court of Appeals is presumptuously speculative. No such course involving the exposure of all of Smith's previous contradictory statements need have been hazarded by the defense. Instead, the defense could well have limited itself to a thorough examination of the motives of Smith and his colleagues in testifying for the Government.* The Court of Appeals' further observation that the defense proceeded to cross-examine Parks, Cordero and Zaher in the same fashion as Smith had been cross-examined omits any true appreciation of the climate which had, by this time, developed at the trial. Once Smith's extensive testimony suggesting Mafia involvement on the part of the petitioners had come into the case, damage to the defense cause had been inflicted in doses too massive to overcome. The jury mentality in regard to petitioners' involvement in organized crime was inalterably fixed by the time Smith concluded his testimony. In this situation, it can hardly be urged with fairness that the relatively delicate, if not actually shy, cross-examinations of the other bankrobbers regarding their previous inconsistent statements evidenced an uncaring attitude respecting the issue of fear as it affected the defense. Finally, we are truly non-plussed at the statement

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* Correspondence from the accomplices to the U.S. Attorney indicating their understandings in regard to special consideration on sentence and other benefits was available to the defense in voluminous quantity.

made in the opinion of the Court of Appeals that the statement of the prosecutor acknowledging his tampering with the grand jury testimony of Smith was "made in the heat of courtroom argument" and that "it would be wrong to take the quoted statement . . . as an admission that the prosecutor had done this." (Appendix A, p. A14) Any objective reading of the statement of the prosecutor respecting the fact of his testimonial direction to Smith makes it quite clear that the prosecutor's admission in this regard was perfectly candid and not the result of a heated and erroneous outburst. That fact is borne out by the subsequent examination of Smith by the prosecutor in which the witness was asked by the prosecutor whether he had had a conversation "with me" regarding fear "prior to testifying before the [March, 1966] federal grand jury" (1417-8). In this connection, it is also most pertinent that at no time during the trial following the disclosure by the prosecutor of his manipulation of the Smith testimony did he ever claim that his assertions to the court respecting this were other than true or that they had been triggered by false recollection in the heat of argument.

We also urge that the conduct of the prosecutor described herein inevitably exposed the petitioners to uncontrovertible claims of alleged Mafia involvement. Smith's assertions that he had received communications from third persons allegedly indicating his exposure to reprisal presented no target at which the petitioners could level any fire. Concerning the truth of these alleged communications indicating petitioners' status as underworld figures, the court instructed the jury that the truth or falsity of petitioners actual criminal status was irrelevant. All that was material, instructed the trial court, was Smith's alleged fearful

state of mind. In this manner, the way was laid open for the prosecution to show by hearsay and innuendo that the petitioners were important criminal personages. No direct, relevant, or legally admissible testimony probative of petitioners' underworld employment or their projection of threats was ever adduced to the jury. The panel was, however, freely permitted to speculate on these subjects and the petitioners were at all times without any evidentiary target upon which they could center some contradictory salvos. By this device, petitioners were deprived of their Sixth Amendment right of confrontation and their Fifth Amendment entitlement to due process of law. No single factor visited greater prejudice upon the petitioners' case than their exposure to the jury, as indicated herein, as members of organized crime. To have been so denigrated, without having themselves taken the stand, constituted a mockery of the concept of a fair trial.

We also urge that it was highly prejudicial error for the trial court to have permitted testimony concerning fear without at the same time requiring adherence to a standard showing some objective verification for both the claimed mental state and the facts alleged by Smith to have produced it. At the very least, in a case involving strong suggestions to the jury of Mafia participation, there should have been a threshold showing that Smith's alleged fears had some objectively verifiable basis. Our review of the cases in the Court of Appeals gave an extremely strong indication that in all considered opinions on the subject, there was shown independent circumstances giving rise to the claimed state of mind (*People* v. *Buchalter*, 289 N.Y. 181 and see *Carbo* v. *United States*, 314 F. 2d 718). Thus, for example, in the *Buchalter* case, there was ex-

trinsic verification of the fact that the fear-ridden witness there had actually been shot through the head in order to insure his silence. And, in *Carbo,* it will be seen that the record and opinion is rife with instances of specific threats to kill and harm and some of these threats are on minifon tapes, and in the testimony of persons having no vested interest in the case. The case of *United States* v. *Scandifia* (—— F. 2d ——, decided, Jan. 31, 1968) relied upon by the Court of Appeals in its opinion is inapposite to our discussion here. *Scandifia* involved a situation in which the defendant himself actually imparted the menacing instructions directly to the witness.

In our view, there is no beacon authority in the federal courts coming directly to grips with the issues posed under this heading. We urge, therefore, that it is timely and appropriate for this Court to now set forth guidelines to be applied in cases alleged to involve organized crime which will delimit the Government in its presentation of proof aimed at showing that defendants have inculcated fear in the minds of Government witnesses. Unless some standard requiring objective verification of such claimed fears is required, convictions based upon reputation rather than objective and persuasive proof will become the order of the day.

II.

(Concerning Question 3)

The admission of evidence which expanded the scope of the conspiracy from the indictment's charge of an agreement to rob banks and receive the proceeds to encompass a second conspiratorial purpose—silence and concealment of those crimes—and the admission of evidence which extend-

ed its duration at least a month beyond the 11-week period specified in the indictment raise fundamental Fifth and Sixth Amendment questions and questions of federal criminal procedure in the context of another serious issue in its own right—the limits of the crime of conspiracy.

This Court has not had occasion to treat the issue of variance between indictment and proof since 1962 in *Russell* v. *United States,* 369 U.S. 749, and *Stirone* v. *United States,* 361 U.S. 212 (1960), and then in circumstances not directly applicable to the main run of criminal prosecutions and in particular to conspiracy trials. Petitioners believe that the judgment of conviction is contrary to the principles of *Russell* and *Stirone* and that it is necessary for this Court to settle the application of those cases to the more common areas of federal prosecution. The basic question to be resolved is the extent to which the Government may vary its proof at trial from its statement of the essential facts in the indictment, required and defined by the Fifth Amendment and Fed. R. Crim. P. 7(c). The answer also involves the extent of a defendant's Sixth Amendment rights to be apprised of the nature and cause of the accusation he must be prepared to meet and to prevent his retrial for the same offense.

The seriousness of the variance and its significance to this Court are heightened because the variance arises in the context of a conspiracy prosecution. The questions raised involve extension of the duration and enlargement of the purposes of the conspiracy charged in an indictment. This Court in *Krulewitch* v. *United States,* 336 U.S. 440 (1949), *Lutwak* v. *United States,* 344 U.S. 604 (1953), and *Grunewald* v. *United States,* 353 U.S. 391 (1957), expressed

concern with the amorphous and elastic nature of the crime of conspiracy. In each of those cases this Court taught that a conspiracy to conceal the principal objective of a conspiracy after it is achieved or fails is not an implied part of that conspiracy, but a separate conspiracy. Petitioners contend that the judgment below conflicts with the teaching of those cases. The Court of Appeals sidestepped the issue, completely ignoring that the conspiracy to conceal the substantive crimes and aid arrested defendants was not even suggested in the indictment. Thus, the only variance it professed to find (and held immaterial) was between the indictment's termination date and the proof of a conspiracy for a month thereafter. The *Krulewitch, Lutwak, Grunewald* trilogy show that in conspiracy cases the stakes are often the highest and hence the temptations to the Government the most difficult to resist. Yet, to defendants, conspiracy is often the most difficult crime to rebut; and the proof at trial—hearsay from accomplices—is at once the most damning and the most unreliable. All those characteristics fit this case. Petitioners therefore believe that in the general application of the point raised to all criminal cases, and in particular to conspiracy cases, as well as because of the gravity of the error and the seriousness of its consequences to them, the writ should be granted.

III.

(Concerning Question 4)

Divulgence of the identity of the informant(s) referred to in the Murphy affidavit was essential if the defense was to have been given any real opportunity to reveal the testimony of the bankrobber witnesses as a fraud.

We claim, that in a case of this sort—so dependent upon inbred and controlled proof—it was grave error for the Court to close off the possibility of an inquiry through the informer into the issue of Mrs. Cordero's complicity, and the larger issue relating to a plot to substitute the petitioners as the robbery ring leaders. Notwithstanding the special needs of the defense to probe more deeply with the informant for information establishing their own innocence; notwithstanding the utter paucity of the Government's essentially endogamous proof; and without any regard for truly balancing the competing interests claimed by the Government on the one hand and the defense on the other, the court snapped shut the door of deeper truth. Having come upon such very strong indications that Mrs. Cordero was herself deeply involved in the robberies, it was incumbent upon the court to set aside the barriers which might normally have prevented the type of inquiry which the defense sought. By reason of the court's adverse ruling, a person, or persons, having intimate knowledge of the means by which the robberies were actually arranged was kept beyond the reach of the defense. The harshness of this result is immediately seen when it is considered that the persons protected were secret intruders into the clique run by the Government's own robbery-witnesses. We seriously question the propriety of shielding a set of Government informers whose testimony would be most objected to only by another group of persons who turn out to be actual principals in the crimes charged in the indictment. We ask, how can it be that the administration of justice should countenance the protection of one set of informers so that another such group (the robbery witnesses herein) may be given carte blanche to

fabricate completely self-serving stories. We contend, therefore, that the facts shown herein reveal a substantial constitutional issue relating to the obligation of the Government to make available to the defense all reasonable avenues of exculpation. As stated in *Roviaro* v. *United States*, 353 U.S. 60, 62:

> "Where the disclosure of an informer's identity, or the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege [against disclosure] must give way."

IV.

(Concerning Question 5)

The instant case presents for the Court's consideration the need to establish reasonable guidelines which will operate to control the Government in its wide ranging efforts to secure trial testimony in support of its prosecutions. Where, as here, the primary target of the Government is an individual most anxiously sought for conviction, a serious question arises concerning the extent to which the Government may be allowed to go by way of insuring the testimony of its witnesses. In the instant case, the Government, quite apparently entered into a "deal" with the robbery quartet which implied, even if it did not explicitly guarantee, the greatest possible consideration for testimony inculpating the petitioner Franzese and his co-defendants. Burdened by the absence of independent testimony establishing the guilt of the petitioners, the Government was effectively driven to make a

bargain with their alleged accomplices. Part of that bargain, it would appear, involved the shocking return of $10,000 in stolen bank funds, as well as the return of proceeds derived from the sale of valuable automobiles either purchased with the proceeds of crime or used in connection with the robbers general criminal endeavors.

One may well ask how far the Government should be permitted to go in providing itself with testimony to sustain convictions. The boundaries transgressed in this case by the Government, we say, took it far beyond the reasonable and honest limits which the due administration of justice might require. Here, the Government struck its bargain with the devils and then brought to bear upon the jury all of the pressures of assumed virtuous governmental concern to rationalize its conduct. The whole weight of 'establishment' virtue and public need was offered as a counter-balance to the repelling, offensive and heedless course of conduct taken by officialdom in dealing with the bankrobbers. Had any defense counsel undertaken to confer the benefits given here by the Government on any of its own witnesses, as a consideration for testimony, sure grounds for disbarment would have been established. A double standard respecting the price for testimony cannot be tolerated. Mere exposure to the jury of the fact of the Government's misconduct is not enough. Vigorous and certain means of discipline must be imposed to insure that prosecutors are not given a license to trade away the cash of victims for desired testimony—especially when that testimony is lacking in fundamental hallmarks of truth and is completely unsupported by independent evidence establishing guilt.

Our objection to the conduct of the prosecution respecting finances and witness consideration in this case was not completely ignored in the Court of Appeals. There, it was observed that the "Government's attitude strikes us as rather complacent"; . . . (Appendix A, p. A19). While the Court of Appeals could not, in all the circumstances, see its way clear to invoke necessary supervisory action, we respectfully urge that the Government's conduct in this case cries out for such sanction.

V.

(Concerning Question 6)

The occasions when and the manner in which the Government should be required to disclose whether there has been electronic eavesdropping related to a criminal prosecution is a matter which has recently been before this Court on several occasions. The matter is important since it involves potential infringement of Fourth, Fifth and Sixth Amendment rights as well as the appropriate standards of conduct of federal prosecutions.

Aspects of the disclosure policy with respect to eavesdropping announced by the Department of Justice in its Supplemental Memorandum, *Schipani* v. *United States,* No. 504 October Term 1966, 385 U.S. 372 (1966), and as it has subsequently evolved, *see, e.g.,* Brief for the United States in Response to Petition for Certiorari, *O'Brien* v. *United States,* No. 823 October Term 1966, *remanded* 386 U.S. 345 (1967), involve the supervisory power of this Court in several respects.

The fundamental question raised is whether the Government should be required to disclose whether eavesdropping

occurred only if petitioners can first show that the Federal Government has engaged in at least one instance of eavesdropping. This "red handed" test was asserted by the Government in its response to petitioners' request for disclosure in the Court of Appeals. Petitioners argued there that at least with respect to cases where some law enforcement agency had admittedly eavesdropped (here the New York police), in a case where organized crime is involved, and whose preparation preceded the Government's announced policy not to eavesdrop indiscriminately in future, the Department of Justice should be required to make the review and disclosure announced in *Schipani*. The scope of that review and disclosure, and to whom—the court or defense counsel—it should be made, is presently before this Court in *Kolod* v. *United States*, No. 133 October 1967 Term, *remanded, per curiam*, 36 U.S.L.W. 3306 (Jan. 29, 1968), *motion to modify order set for argument, id.* at 3365 (March 12, 1968).

The supervisory power of this Court is also involved in the issue of *when* the Department of Justice should review its files and disclose whether eavesdropping occurred. It would seem improper for the Department of Justice to refuse disclosure in a lower court, as it has here, only to have the Solicitor General make the response sought by defendants in answer to a petition for certiorari. Yet, this is what occurred in his Brief in Opposition for Petition for Certiorari, *Serman* v. *United States*, No. 320 October 1967 Term, *cert. denied*, 389 U.S. 843 (1967). Such a delay has at least three unfortunate consequences: It puts defendants to unnecessary delay, expense and perhaps incarceration; it forces lower courts to adjudicate cases where a new trial or a hearing should first be granted; and it unneces-

sarily burdens this Court's docket with a matter which could be adequately dealt with in lower courts. Petitioners therefore believe that they were entitled to full disclosure after plenary Justice Department review of whether eavesdropping occurred despite no proven federal incident of eavesdropping, and further, that such disclosure should have been made immediately when sought.

CONCLUSION

For the foregoing reasons, this joint petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 262—September Term, 1967.

(Argued February 23, 1968 Decided March 25, 1968.)

Docket No. 31391

UNITED STATES OF AMERICA,

Appellee,

—v.—

JOHN FRANZESE, also known as "Sonny," WILLIAM DAVID CRABBE, also known as "Red," JOHN MATERA, also known as "Johnny Irish," NICHOLAS POTERE and JOSEPH M. FLORIO, also known as "Whitey,"

Appellants.

Before:

FRIENDLY and SMITH, *Circuit Judges,*
and GIGNOUX, *District Judge.**

Appeals from a judgment of the District Court for the Eastern District of New York, Jacob Mishler, *Judge,* convicting five defendants, after a verdict, on three substantive counts and a conspiracy count relating to bank robberies. Affirmed.

* Of the District Court of Maine, sitting by designation.

MAURICE EDELBAUM, New York, N. Y. (Lawrence K. Feitell, of Counsel), *for Appellant John Franzese.*

PHILIP VITELLO, New York, N.Y. (Lawrence K. Feitell, of Counsel), *for Appellant Joseph M. Florio.*

WILLIAM L. LYNCH, New York, N. Y., *for Appellant William David Crabbe.*

RAYMOND A. BROWN, Jersey City, N. J., *for Appellant John Matera.*

AARON J. JAFFE, New York, N. Y., *for Appellant Nicholas Potere.*

JEROME C. DITORE, Ass't U. S. Attorney (Joseph M. Hoey, U. S. Attorney for Eastern District of New York), *for Appellee.*

FRIENDLY, *Circuit Judge*:

Five defendants, Franzese, Crabbe, Matera, Potere and Florio, appeal from convictions, after a verdict, in the District Court for the Eastern District of New York on two counts of an indictment, returned in April, 1966, charging robbery of two federal savings and loan associations on Long Island by placing lives in jeopardy in violation of 18 U. S. C. §2113(d), a count for receiving currency and travelers' checks taken from a bank in Utah whose deposits were insured by the Federal Deposit Insurance Corporation in violation of 18 U. S. C. §2113(c), and a count for conspiring to engage in bank robberies in violation of 18 U. S. C. §371.[1] A chart in the margin shows the counts on

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[1] Judge Mishler granted a change of venue from Brooklyn because of pre-trial publicity; on the consent of all the defendants the trial was held in Albany.

which various defendants were convicted and the sentences imposed—some being very heavy ones.[2]

The prosecution had some unusual aspects, of which defendants have properly made much both at trial and on appeal. None of the appellants is claimed to have been present at any of the bank robberies here charged. The Government's case against them rested almost entirely on the testimony of four confessed participants—Smith, Parks, Cordero and Zaher—who cast the defendants in the role of behind-the-scenes operators of a nationwide bank rob-

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[2]

Count	*Bank*	*Defendants*	*Sentence*
2 Robbery of a savings & loan ass'n by placing lives in jeopardy. 18 USC §§2113(d) and 2.	Federal Savings & Loan Queens Co.	Franzese	25 years & $10,000
		Potere	15 years
		Florio	15 years
4 Robbery of a savings & loan ass'n by placing lives in jeopardy. 18 USC §§2113(d) and 2.	United Savings & Loan Ass'n, Oceanside, L. I.	Franzese	25 years & $10,000 (consecutive with #2)
		Potere	15 years (concurrent with #2)
		Florio	15 years (concurrent with #2)
7 Receiving stolen currency and travelers checks from a federally insured bank. 18 USC §§2113(c) and 2.	First Security Bank of Utah, Salt Lake City, Utah	Franzese	10 years (concurrent with #2 and #4)
		Crabbe	5 years (concurrent with #8)
		Matera	5 years (concurrent with #8)
		Potere	10 years (concurrent with #2, #4 and #8)
		Florio	10 years (concurrent with #2, #4 and #8)
8 Conspiracy to rob federally insured banks. 18 USC §§371 and 2.	Queens Co. Sav. & Loan	Franzese	5 years (consecutive with #7, concurrent with #2 and #4)
	Oceanside Sav. & Loan	Crabbe	5 years (concurrent with #7)

very business.[3] Franzese was the general manager; Potere was the procurer and explicator of plans of the banks and took general charge of logistics; Florio assisted in these operations and in weapon procurement; and Matera and Crabbe played lesser parts. What is more troubling is that three of the Government witnesses—Smith, Parks and Zaher—had previously depicted Anthony Polisi, owner of the Aqueduct Motor Inn in Queens, as the master-mind of the same enterprise and had so testified in a trial in January, 1966, wherein Anthony and his son Salvatore were convicted, in contrast to the testimony of Smith, Parks and Cordero at the instant trial that Anthony's services after mid-July, 1965, were in storing weapons and furnish-

Bank	*Defendants*	*Sentence*
Holyoke Nat'l Bank	Matera	5 years (concurrent with #7)
First Security Bank of Utah	Potere	5 years (concurrent with #2, #4 and #7)
Banco de Ponce (Brooklyn)	Florio	5 years (concurrent with #2, #4 and #7)
East Tremont Sav. & Loan		
United Industrial Bank (Brooklyn)		
Lafayette Nat'l Bank (Suffern)		
Manufacturers Hanover Trust Co. (Brooklyn)		
Suffolk Franklin Savings Bank		
Franklin National Bank (Great Neck)		
Certain Banks in California		

[3] The only other evidence of importance adduced by the Government was testimony by the lawyers who had represented Parks and Cordero after their arrests to the receipt from Potere of $1100 for Parks and $960 for Cordero—this to be used for attorneys' fees and bail and for a payment of $500 to Mrs. Cordero.

ing a meeting place. This was substantially what Cordero, who had not been called as a witness against the Polisis, had said in statements to the FBI shortly after his arrest on September 30, 1965.[4]

While the testimony of the four participants was exceedingly detailed and circumstantial—indeed therein lay its strength—we shall state only so much as constitutes necessary background for the legal contentions raised on appeal: The quartet, dissatisfied with Anthony Polisi's management, were summoned to a meeting at the Aqueduct Motor Inn on an evening in late July 1965, attended by all five appellants. Franzese announced that he was taking over, or a 50-50 basis, and that work orders would be issued by his four associates from time to time. Matera added that the arrangements included money for bail and for lawyers in the event of arrest, but that "ratting on anybody is completely out of the question because we will get you." Franzese confirmed the former comforting as-

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[4] In fact the inconsistency was not quite so great as appellants argue. The indictment in the *Polisi* case had three counts. Count One charged the robbery of the Central Queens Savings & Loan Ass'n on July 7, 1965, Count Two charged the robbery of the same institution by putting persons in danger, and Count Three charged a general conspiracy to rob both the Central Queens institution and the Queens County Federal Savings & Loan Ass'n on July 30, 1965, one of the robberies charged in the instant indictment. The evidence at the Polisi trial also included a robbery of the Jamaica Savings & Loan Ass'n on July 13, 1965. The testimony at the Polisi trial as to the robberies of July 7 and 13, both antedating a meeting hereafter described where Franzese is alleged to have taken over, is consistent with the story told by the Government's witnesses in this case; the conflict comes with the robbery of the Queens County Federal Savings & Loan Ass'n on July 30. This court affirmed the Polisis' convictions from the bench in November, 1966; the Government did not disclose its new information as to Anthony's less significant role in the Queens County Savings & Loan robbery.

surance and made known that his services included the stealing of cars to be used in the robberies and that, after a reasonable period of success, the robbers could cease their robbing and he would act as an investment counselor for them.

Another meeting occurred toward the very end of July. At the first phase, attended by Potere, Florio and Cordero, Franzese announced the acquisition of plans of five banks, including the Queens and Oceanside banks the later robberies of which were charged in substantive counts of the indictment. These plans had been supplemented with an indication of the get-away route and the location for the cars to which the robbers would switch after abandoning the get-away cars. There were renewed assurances about bail and lawyers and confirmation of the financial split. Later the participants other than Franzese adjourned to the Aqueduct Motor Inn, met with Parks, Smith and Anthony Polisi, and arranged for all but Polisi to reconnoiter the five banks the next day. After a dress rehearsal conducted by Florio in which the get-away driver, Anne Messineo, was introduced, Cordero, Parks and Smith robbed the Queens County Federal Savings and Loan Association on July 30, 1965, with disappointing results due to their failure to enter the vault. After a similar prelude the trio robbed the United States Savings and Loan Association in Oceanside, Long Island, on August 13, 1965, again with less than spectacular success.

We pass over activities planned for banks in Massachusetts, leading to the robbery of the Holyoke National Bank in Chicopee, accomplished on August 31, by Smith, Parks and Cordero, again without entering the vault, wherein Smith's girl friend Carol Scalzo and Salvatore

Polisi played supporting roles. Early in September, Franzese directed that activities be transferred to Denver and Salt Lake City. Cordero was to take his wife and Smith was to take Carol. Crabbe, who now reappeared, asked leave to go along, but Franzese declined because of needing him closer to home. After the kind of contretemps happily characteristic of such ventures, the two couples and Parks arrived in Denver behind schedule, the men robbed the bank on a Saturday rather than the appointed Friday for the truly meagre haul of $300, and all proceeded to Salt Lake City. Monday brought better luck there—$33,000 in cash and some travelers' checks. Desire of the robbers to alter the agreed split led to a meeting between them and Franzese, Florio, Matera and Crabbe at the Sky-way Motel in Queens. Florio told Franzese the trio had offered only $6000 plus the travelers' checks as his share. Crabbe counted the cash; Matera examined the checks, assured Franzese there would be no trouble in getting rid of them, and put them in his pocket. Somewhat surprisingly, Franzese did not cavil overmuch at the unilateral change in terms, although taking a sterner tone for the future. There was talk of California and some preliminary observations were later made on Long Island and in Brooklyn, but time was running out for the four robbers. Parks and Smith were arrested on September 30, Cordero on October 1, and Zaher, whom Matera had warned not to be around, on October 8. The promised immediate succor was not forthcoming, save as indicated in footnote 3 and for payments of $200 by Anthony Polisi to Zaher and of $50 by Potere to Smith.

Sufficiency of the Evidence

Matera and Crabbe are the only appellants to challenge the sufficiency of the evidence, and they do this solely with respect to Count 7 for receiving property stolen from the Utah bank. The evidence of their activities at the division of the loot meeting was sufficient for submission to the jury, particularly when this is taken in the light of evidence that we have recounted and of more that we have not. In any event the point is immaterial in view of the concurrent sentence on the conspiracy count. *Lawn* v. *United States,* 355 U. S. 339, 359, 362 (1958). We likewise reject Matera's argument that the court committed reversible error in refusing to charge he was entitled to an acquittal if the jury believed testimony adduced by him to show that he was sojourning with his wife and a Mr. and Mrs. Scotto at a resort in the Poconos from July 17 to July 24—a period including the date of the organization meeting which, along with the meeting on the robbers' return from Salt Lake City, constituted his sole proven participation in the crimes. The judge had properly instructed as to reasonable doubt and the jury manifested its realization of the importance of the alibi evidence by asking for a rereading of the direct testimony of Mrs. Matera, Mrs. Scotto and a Mrs. Principe, a friend who had also been at the resort. Having heard these witnesses, the jury evidently chose not to credit them.[5] That was its prerogative.

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[5] Matera's claim that the trial judge unfairly discredited a fourth witness, the owner of the hotel, who had testified to Matera's room reservations, by asking whether there were records that would show Matera's presence in the dining room, is without basis. The room records alone would not negate Matera's attendance

Appendix A—Opinion of United States Court of Appeals

The Government's Rehabilitation of Its Witnesses

The point most strongly pressed concerns the extent to which the Government was allowed to rehabilitate its witnesses after impeachment based on their failure to mention the defendants in statements given the FBI on their arrest and their testimony before the grand jury which indicted the Polisis and at the Polisi trial. The problem first arose in the case of Smith, the Government's lead witness. In his grand jury testimony against the instant defendants, which had been furnished defense counsel before he took the stand, Smith had been asked to account for the discrepancy between it and his failure to include the defendants in the information previously given the Government and his testimony in the Polisi proceedings. He answered:

> "Because, as far as I was concerned, I was ready to go and take my just punishment. They would look out for my family and put up the bail money, and try and get me back out. And they just didn't do it. And I felt I didn't owe them nothing no more."

Appellants hammered away at Smith on the basis of his long failure to include them in his list of culprits and his fixing of managerial responsibility in the elder Polisi, see fn. 4.

The Government then made known to the court that it proposed to rehabilitate Smith by showing that his previous silence as to the defendants was due to fear. After requesting counsel to prepare memoranda over a weekend, Judge Mishler said that his own search had led him tentatively to conclude that a witness may explain an in-

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at the evening meeting in Queens and it was important for everyone, including Matera, to know whether anything more was available.

consistency on the basis of fear even if his doing so imparts evidence of another crime, but that the trial judge has an obligation to allow "only so much . . . as will explain his fears" and to "exclude any other matter that . . . will lead the jury away from these issues and in effect decide the character or other crimes of these defendants." After much discussion it was decided to conduct a hearing outside the presence of the jury, at which Smith would explain the basis of his fears.

Smith's explanations proved exceedingly colorful—so much so that the judge felt it necessary to impose limitations on what the prosecution could elicit before the jury. He also carefully instructed the jury as to the bearing of the evidence it was about to hear. He explained that some of this would relate to issues not in the case and also would be hearsay if offered as proof of the facts stated, and that "the real issue is did this witness believe what he heard and what he understood generally and was it for that reason that he failed to name these defendants at the previous times and on the previous occasions."

Smith then testified that when he gave statements to the FBI on October 14, 1965 and evidence at the Polisi trial in January 1966, he feared for his life if he were to implicate the defendants. He cited the statement by Matera at the organization meeting as to what would happen if anyone informed. He said also that Carol Scalzo, his girl friend, warned him, while in jail, that Potere was aware that he had not informed on the instant defendants and had said Smith must know what would happen to himself if he did.[6] He continued that on October 14, 1965, he

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[6] We find no merit in appellants' complaint of the Government's failure to call Scalzo. She was not in custody and was equally available to appellants.

was told by Parks, Zaher and Cordero that they had made no statements against these defendants, and that the four discussed the threat of bodily harm or death if Smith informed. Smith further stated that he feared death in prison if he informed; that when he joined the conspiracy he was promised money for lawyers, bail and his family, benefits he would lose if he informed; that he believed his family would be harmed if he implicated the defendants; that in September 1965, he asked Zaher if the latter would inform on the defendants if arrested and Zaher had said, "No, I know better than that, I have a family out there"; and that while in jail in January 1966, Zaher told Smith that a prison guard, Gucci,[7] brought him a message warning Zaher that if he informed on the defendants, he would wind up dead. After having followed the same procedure as with Smith, the judge allowed Cordero to testify that his failure to mention the defendants in statements given the FBI and testimony before the grand jury in October 1965 was due to fear for his safety both in and out of prison and for his family, based on conversations with Franzese, Crabbe, Florio and Parks, and also to apprehension that he would lose money for bail, lawyers and his family if he informed. Parks was similarly permitted to explain that his failure to mention the defendants in his FBI statements of October 1965 and his testimony before the Polisi grand jury and at the Polisi trial

[7] Gucci was produced by the Government for appellants, who interviewed him but chose not to call him, avowedly because his credibility would not withstand a federal conviction for violating his duties as a prison guard.

was due to fear of bodily harm, based on conversations with Matera and Crabbe and with inmates of the Federal House of Detention.[8]

Appellants do not seriously challenge the basic principle that a witness impeached on the basis of prior inconsistency "may always endeavor to explain away the effect of the supposed inconsistency by relating whatever circumstances would naturally remove it," 3 Wigmore, Evidence §1044, p. 737 (3d ed. 1940)—a rule we recently applied in *United States* v. *Scandifia*, —— F. 2d ——, —— (2 Cir. 1968). Fear of the consequences of plain speaking is such a circumstance, as many cases have held, see, in addition to *Scandifia*, *People* v. *Chapleau*, 121 N. Y. 266, 277 (1890); *People* v. *Buchalter*, 289 N.Y. 181, 202 (1942); *Hendrickson* v. *Commonwealth*, 23 Ky. L. Rep. 1191, 1194-95, 64 S. W. 954, 956 (1901); and *Bradford* v. *State*, 90 So. 2d 96, 97-98 (Ala. 1956). It is likewise clear that the witness may explain his fear as induced by a threat communicated by an intermediary, *United States* v. *Scandifia*, *supra*, —— F. 2d at ——, n. 8; *State* v. *Minton*, 68 S. E. 2d 844, 850 (N. C. 1952), although the opposing party is entitled to an instruction, here given by the judge of his own motion, that the intermediary's statement is not evidence that the threat in fact was made by the alleged source. While rehabilitation of this sort may well have a spill-over effect, the process is essential to development of the truth and reliance must be placed on trial judges to prevent unfair tactics by the prosecution.

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[8] Zaher was not permitted to testify with similar elaboration since there was no inconsistency between his evidence at the instant trial and his prior statements—Zaher having been absent from July 21 until shortly before the arrests.

Appellants rely on two main contentions to escape these settled rules. One is that their counsel were led into cross-examining on the basis of prior inconsistency, with consequent alleged devastating effect of the rehabilitation on the defendants, by Smith's incomplete explanation before the grand jury which we have quoted. The other is that it was error to allow the witnesses to testify generally to a state of fear as distinguished from specific incidents emanating from the defendants. We find no force in either argument.

Faced with the extremely circumstantial accounts given by the four witnesses, with no material inconsistencies among them and no contradiction save for Matera's alibi evidence as to his absence in the Poconos at the time of the organization meeting, appellants' counsel could not have afforded to rely merely on the witnesses' bad records and the usual attacks on the testimony of accomplices with much to gain by concocting a story the prosecution would like to hear. Development of the witnesses' prior inconsistency was the only real hope for arousing reasonable doubt—as evidenced by counsel's continued use of this tactic on Cordero and Parks, who had made no statement like Smith's before the grand jury, after experience with Smith revealed the riposte this would almost certainly attract. We thus cannot take seriously appellants' argument that it was Smith's statement that led their counsel into a trap.

In any event none of this would have legal consequence unless the Government was in some way culpable. Appellants say it was. They cite a statement by the prosecutor in colloquy that he "had a conversation with each of these

witnesses before they went into that grand jury and said 'Don't mention this organized crime in there; don't mention this killing business; don't mention the fear element' and the same when these people have been put on the stand." Needless to say, we strongly disapprove a prosecutor's ever advising a witness to tell less than the whole truth. But it would be wrong to take the quoted statement, made in the heat of courtroom argument, as an admission that the prosecutor had done this. We read his warning to the witnesses rather as a caution, commendable in itself, against volunteering information concerning the defendants' criminal background not responsive to specific inquiries. If the prosecutor is to be faulted at all, it would be rather for allowing Smith's answer to the grand jury to stand without amplification, assuming as we do that he then knew how incomplete it was. But it would be calling for more prescience than prosecutors can reasonably be expected to possess to think that this omission, favorable to the accused at the time, was intended to lure them to their destruction at the trial.

Several of the authorities previously cited sustain the proposition that an impeached witness may explain a previous inconsistency on the basis of fear generally, *People* v. *Chapleau, supra; Bradford* v. *State, supra,* leaving it to the impeacher to inquire into the basis if so advised. Moreover the witnesses here did cite chapter and verse for their fear and the examinations conducted outside the presence of the jury demonstrated they could have given a good deal more. To the extent that the judge prevented proof

of specific incidents, the defendants were the gainers;[9] his conduct of this novel trial problem deserves commendation rather than the censure the defendants urge.

Mrs. Cordero

Appellants make a number of arguments relating to Mrs. Cordero. An FBI report given to defense counsel had recorded Cordero as stating that his wife had driven one of the three switch cars following the Oceanside bank robbery of August 13. On cross-examination Cordero denied having said this, although he stated that his wife had innocently participated in the robbery and elaborated on redirect that she had been waiting in the "switch car point" area. After the Government rested, appellants stated they intended to call FBI Agent Murphy to ascertain the name of an informer whose statement that Mrs. Cordero drove the car used in the Oceanside robbery had afforded the basis for an affidavit by Murphy leading to her arrest. On a *voir dire* examination Murphy said that the informer had no part in the robberies and that the information as to Mrs. Cordero's ownership of a car that took part in the robbery was in error. When the Government objected to Murphy's being compelled to divulge the name of the in-

[9] For example, Cordero was not permitted to testify that Franzese had admitted that he had ordered Ernie "The Hawk" Rupolo, who at one time testified against Vito Genovese, to be killed in gang-land fashion—shot, stabbed, tied up, put in cement, and thrown into Jamaica Bay—and that Crabbe had said he was personally going to kill a fence who had testified against him, just as he had killed the "Hawk." He also was not permitted to testify that Crabbe had threatened to kill Mrs. Cordero because Crabbe thought she was giving information to the "cops" and that Franzese had ordered Cordero to get her out of town.

former, defense counsel argued this was necessary to enable them to attack the credibility of Cordero's statement that his wife had not participated in the robbery and to demonstrate a further reason for Cordero's seeking the Government's favor.[10] Considering these issues to be "purely collateral," the judge thought the benefit of revelation to the defense was outweighed by detriment to the Government in its investigation of crime and by danger to the informer.

On what was put to him the judge's decision was well within the discretion necessarily allowed under the controlling ruling in *Roviaro* v. *United States,* 353 U. S. 53, 62 (1957). Evidence that a witness had lied in refusing to implicate an unrelated person not indicted would be inadmissible even under the test of "collateralness" approved by Wigmore, perhaps more liberal than that generally applied: "Could the fact, as to which error is predicated, have been shown in evidence for any purpose independently of the contradiction?" 3 Evidence, §1003 at p. 657; see *Smallfield* v. *Home Ins. Co. of New York,* 244 F. 2d 337, 341 (9 Cir. 1957); the case would have stood differently in this regard if Anne Messineo had been on trial and her counsel had sought the informer's testimony to prove that Mrs. Cordero rather than Anne drove the get-away car. The sole basis for admissibility of evidence of Mrs. Cordero's participation would thus have been in furnishing a

[10] Defense counsel also urged that testimony by the informer might cast a sinister light on the Government's return of money to Mrs. Cordero—a subject discussed below. However, apart from other considerations, the information related to the Oceanside robbery whereas the suspicion as to the money was primarily as to the later Salt Lake City robbery.

further indication of Cordero's bias and corruption. While evidence would have been receivable for that purpose, see id. §1005(2), the jury had already heard so much on that subject, including Cordero's own rather equivocal testimony as to his wife's involvement, which the judge expressly called to their attention in his charge, that the incremental value of evidence by the informer was outweighed by the opposing considerations, especially the great dangers to him indicated by what the "fear" testimony of Smith, Cordero and Parks had revealed.

In brief and argument before us, appellants have developed a somewhat different theory as to the use to which they might have put the informer. Stressing the Government witnesses' opportunities to develop a consistent story while living together in jail, they argue that, as said in Franzese's brief, "it was of the utmost importance to the defense to show that the exclusion of Mrs. Cordero by the connivance of the gunmen was related, part and parcel, to the objective of keeping Mrs. Cordero out of the case lest she become an uncontrollable link in the government's chain of proof." The suggestion, apparently, is that if the informer had implicated Mrs. Cordero, the defendants might have called her or the Government might have considered itself forced to call her, with consequences no one now can tell. Apart from the fact that nothing prevented the defense from calling Mrs. Cordero, it suffices that this theory was never presented to the trial judge.[11]

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[11] The trial court examined the FBI intra-office memoranda as to the informer and found they were not producible at the instance of the defendants. We have likewise done this and agree. We add that the information as to Mrs. Cordero is exceedingly vague.

We have been more concerned over another episode. When Cordero was arrested in his house on October 1, 1965, the special agents found a plaid suitcase containing some $10,000 in currency. He then told the agents this money belonged to his wife but at arraignment altered his story and said it was obtained by him from bank robberies. At the trial, although admitting that at one time he told the agents that all of the money was the proceeds of his bank robberies, he stated that only $2000 constituted such proceeds.

The cause of our concern is that prior to trial all this money, except for $200 in $20 bills identified as having come from the Salt Lake City robbery, was returned to Mrs. Cordero. This was done pursuant to order of Judge Mishler, on a motion by Mrs. Cordero supported by her affidavit that "the monies are not the fruits of a robbery and belong to deponent who requires this cash immediately for support of her family," and an affidavit by the prosecutor that, except for the identified bills, "the government has no evidence to show the remaining monies are not those of the aforesaid Eleanor Cordero, and has no other claims for this money from any other party." Conceding as they must that the return of the money was fully before the jury,[12] appellants argue on appeal that this was "dirty

[12] Defense counsel also made considerable point in summation that after the Polisi trial Smith got back a car, which he sold for some $800, and that at some time Parks got back a Cadillac, purchased for $5000 after the Salt Lake City robbery, which he sold for some $3500. There was no evidence that either car had been used in the robberies or that Smith's car had been purchased with their proceeds. Parks claimed he had bought the Cadillac with money won at the race track and from card games; naturally the defense questioned this but the evidence was inconclusive. Although defendants now complain of the charge in respect of these matters, no exception was taken at the trial, and there surely was not "plain error."

business'' requiring at minimum a new trial in which any testimony by Cordero would be excluded. We must confess that the Government's attitude strikes us as rather complaisant; the combination of the presence of bills identified as stolen from the Salt Lake City bank and Cordero's admissions would at least have justified a demand on its part for a hearing at which Mrs. Cordero would have to prove her case by live testimony. But we see no basis for invoking our supervisory powers when the Government submitted the issue to the trial judge, even though we might have been less inclined to order immediate return of the money.

Evidence Concerning Events Subsequent to September 30, 1965

Count 8 of the indictment charged that "On or about and between the 15th day of July 1965 and the 30th day of September 1965, both dates being approximate and inclusive," the defendants conspired to rob various banks, "including but not limited to" a list therein set forth. The indictment named not only the banks proved to have been robbed and others whose robbery had been first considered and then abandoned before September 30 but still others, notably the Great Neck branch of the Franklin National Bank, the Atlantic Ave. branch of the Manufacturers Hanover Trust Company and unknown banks in California that were still on the active list when Parks and Smith were arrested on September 30. Over defense objection the Government was allowed to offer certain evidence as to events somewhat subsequent to that date, notably a $50 payment

from Potere to Smith, a meeting wherein Polisi gave Zaher some money and told him to get rid of his guns and stay away, and, most damaging, telephone calls and correspondence between the lawyers for Parks and Cordero and Potere to obtain money and checks from the latter, see fn. 3.[13]

It is plain enough that but for the September 30 date in the indictment all this evidence would have been competent. The testimony supported the view that the bank robbery conspiracy was a continuing one, with the four arrests merely a rift in the lute so long as the prisoners did not identify their associates who remained at large. The furnishing of bail and lawyers had been an agreed part of the conspiracy from the beginning, designed in part to permit its continuation if mishap should befall any member. Defendants are thus mistaken in relying on such well-known decisions as *Krulewitch* v. *United States,* 336 U. S. 440 (1949); *Lutwak* v. *United States,* 344 U. S. 604 (1953); and *Grunewald* v. *United States,* 353 U. S. 391 (1957), wherein the Court rejected Government efforts to prolong the period during which declarations are deemed in furtherance of a conspiracy and thus admissible against all members or to extend the date for starting the statute of limitations, on the basis of an implied subsidiary conspiracy to conceal a crime fully accomplished. As said in *Grunewald, supra,* 353 U. S. at 405, "[A] vital distinction must be made between acts of concealment done in fur-

[13] Most of these incidents were in October. The sole exception was an exchange of communications between Parks' lawyer and Potere in November and December; the court allowed this only as against Potere but appellants contend the limitation had no practical effect.

therance of the *main* criminal objectives of the conspiracy, and acts of concealment done after these central objectives have been attained, for the purpose only of covering up after the crime." Cf. *Ingram* v. *United States,* 360 U. S. 672, 679 n. 10 (1959). Here the jury could find that the bank robbery conspiracy remained an on-going enterprise after September 30 notwithstanding that several members were in custody. While the Government conceded that their participation had terminated and any declarations by them would thus be inadmissible against others, none were offered, and the judge charged that acts or declarations of other members could be considered only if the jury found the conspiracy continued.[14]

The case is thus the common one of a variance, and a quite inconsequential variance at that. The September 30 date in the indictment was stated to be "approximate," and the overt acts included two September 29 conversations between Potere and Parks as to contemplated inspections and subsequent robberies, which Parks' arrest did not foreclose. Defendants do not seriously contend that proffer of the post-September 30 evidence subjected them to unfair surprise, and there is no appreciable risk of their convictions failing to bar subsequent prosecution for the minor acts after that date. The tests laid down in *Russell* v. *United States,* 369 U. S. 749, 763-64 (1962), are thus amply satisfied.

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[14] Insofar as this charge lumped acts with declarations, it was too favorable to the defense. See *Lutwak* v. *United States, supra,* 344 U. S. at 617-19; *United States* v. *Costello,* 352 F. 2d 848, 853-54 (2 Cir. 1965), vacated on other grounds, —— U.S. —— (1968). Here the post-September 30 evidence seems to have consisted almost solely of acts.

Instructions to the Jury

The only point as to instructions that requires discussion concerns the familiar subject of reasonable doubt. The charge on this point was unexceptionable and without exception, the judge having defined a reasonable doubt to be a "fair doubt . . . based on reason and common sense and reasoning from the state of the evidence" and proof "beyond a reasonable doubt" to be "such as you would be willing to rely and act upon in the most important of your affairs." The difficulty arose when the jury, during its deliberations, requested an explanation of "beyond a reasonable doubt to a moral certainty." The jury had gotten hold of that confusing phrase because the judge had allowed Franzese's counsel to say, in summation, that the Government must prove guilt "beyond a reasonable doubt to a moral certainty."

The Court answered the request by saying:

> "It is rarely possible to prove anything beyond all doubt. The Law requires that the Government prove its case beyond all reasonable doubt. When we talk about proof beyond a reasonable doubt that convinces you to a moral certainty of the defendant's guilt, when we use the term moral certainty, we do not mean that you reach your decision other than by means of reason. It again means that the Government must prove its case beyond a reasonable doubt, and as I intended to convey, an understanding of when we say to a moral certainty. Now the term 'proof beyond a reasonable doubt' in my humble opinion defies further definition than that I have already given you. I hope what I have given you satisfies you.

You may retire for further deliberation on the matter before you."

Appellants objected to this instruction and requested the court to reread its main charge on reasonable doubt. The judge declined on the ground that the jury had not requested it, but offered to recall them and instruct that what he had just said must be placed in context with the entire charge. Appellants declined this offer.

While it would have been better if the judge had complied with appellants' request, it would be quibbling to reverse on that score. In effect the judge told the jury that proof "to a moral certainty" and proof "beyond reasonable doubt" were equivalents, cf. *United States* v. *Johnson*, 343 F. 2d 5 (2 Cir. 1965), and reaffirmed his original charge as to the latter. If appellants had accepted his offer, the jury would very likely have asked to have the original charge reread and any possible confusion would have been dispelled. Even without that, we find nothing to make us fear that the jury was unaware of the heavy burden of persuasion placed upon the Government.

Request for an Order to the Department of Justice to Make an Investigation With Respect to Wiretap Evidence

Prior to trial appellants applied for production of the tapes or records of a wiretap in the Aqueduct motel conducted by the New York City Police Department. The Government reported to the court that the Police Department had no tapes or records; that the Government had had no knowledge of their existence until this was revealed by the defense at the Polisi trial; and that neither it nor its agents had received any information, leads or

evidence from these tapes or any other electronic device. Appellants then dropped the inquiry.

Although nothing in the trial suggested this to have been a misrepresentation, appellants now ask us to direct the Department of Justice to conduct a comprehensive review of its records to determine whether the Government took part in or is aware of any other incidents of wiretapping or electronic eavesdropping. We see no reason for embarking on what, so far as we can see, would be a policy of requiring such an investigation in every criminal case, even when there is not the slightest reason to suspect offensive conduct by the Government. The recent decision in *Kolod* v. *United States*, —— U. S. ——, 36 L. W. 3306-07 (1968), further argument granted March 18, 1968, called to our attention at oral argument, lays down no such mandate. The Supreme Court there held that when the Government admitted monitoring a defendant's conversation, it could not unilaterally determine that nothing revelant had been heard.

We have fully considered other points raised by appellants but believe they do not warrant discussion. We reject the suggestion of misconduct on the part of the trial judge. Judge Mishler presided over this long and hotly contested trial with exemplary fairness and also with the skill in the conduct of difficult multi-defendant prosecutions we have come to expect from him.

The judgments of conviction are affirmed.

APPENDIX B

Judgment and Commitment Appealed From

(U.S.A. v. John Franzese)

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK

No. 66-CR-161

UNITED STATES OF AMERICA

—v.—

JOHN FRANZESE, also known as "Sonny"

On this 14th day of April, 1967 came the attorney for the government and the defendant appeared in person and with counsel

IT IS ADJUDGED that the defendant has been convicted upon a verdict of guilty of the offense of violating T-18, U.S. Code, Sec. 2113(d) & 2, 2113(c) & 2 and 371 & 2, that on or about and between July 15, 1965 and Sept. 30, 1965, both dates being approximate and inclusive, the defendant, with others wilfully & knowingly conspired to take and receive monies and things of value by force, violence and intimidate from the person and presence of employees of banks, which monies and things of value were in the care, custody, control, management and possession of the aforesaid banks, and to place in jeopardy the lives of the

bank employees as well as the lives of any other persons present by the use of dangerous weapons as charged in counts 2, 4, 7 & 8 and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment on count 2 for a period of 25 years pursuant to 18 USC § 4208(a)(2) and to pay a fine of $10,000; On count 4 for a period of 25 years, pursuant to 18 USC § 4208(a)(2), said period to be consecutively to the term imposed under Count 2, and to pay the sum of $10,000; On Count 7 for a period of 10 years, pursuant to 18 USC § 4208(a)(2), to run concurrently with the sentence imposed under Counts 2 and 4; On Count 8 for a period of 5 years, pursuant to 18 USC § 4208(a)(2) to run consecutively to the term imposed under Count 7 but concurrently with the term imposed under Counts 2 and 4.

Appendix B—Judgment and Commitment Appealed From
(U.S.A. v. John Franzese)

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

JACOB MISHLER
United States District Judge

APPENDIX C

Judgment of Affirmance of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-five day of March one thousand nine hundred and sixty-eight.

Present:

HON. HENRY J. FRIENDLY,
HON. J. JOSEPH SMITH,
Circuit Judges,
HON. EDWARD T. GIGNOUX,
District Judge.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOHN FRANZESE, a/k/a "Sonny"; WILLIAM DAVID CRABBE, a/k/a "Red"; JOHN MATERA, a/k/a "Johnny Irish"; NICHOLAS POTERE, and JOSEPH M. FLORIO, a/k/a "Whitey"

Defendants-Appellants,

ANNE MESSINEO, a/k/a "Anne The Singer", et al,

Defendants.

Appendix C—Judgment of Affirmance of United States Court of Appeals

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

APPENDIX D

Statutes Involved

TITLE 18 U.S.C.

§ 2113. BANK ROBBERY AND INCIDENTAL CRIMES

(a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, or any savings and loan association; or

Whoever enters or attempts to enter any bank, or any savings and loan association, or any building used in whole or in part as a bank, or as a savings and loan association, with intent to commit in such bank, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank or such savings and loan association and in violation of any statute of the United States, or any larceny—

Shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.

(b) Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank, or any savings and loan association, shall be fined not more than $5,000 or imprisoned not more than ten years, or both; or

Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value

not exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank, or any savings and loan association, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

(c) Whoever receives, possesses, conceals, stores, barters, sells, or disposes of, any property or money or other thing of value knowing the same to have been taken from a bank, or a savings and loan association, in violation of subsection (b) of this section shall be subject to the punishment provided by said subsection (b) for the taker.

(d) Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not more than $10,000 or imprisoned not more than twenty-five years, or both.

(e) Whoever, in committing any offense defined in this section, or in avoiding or attempting to avoid apprehension for the commission of such offense, or in freeing himself or attempting to free himself from arrest or confinement for such offense, kills any person, or forces any person to accompany him without the consent of such person, shall be imprisoned not less than ten years, or punished by death if the verdict of the jury shall so direct.

(f) As used in this section the term "bank" means any member bank of the Federal Reserve System, and any bank, banking association, trust company, savings bank, or other banking institution organized or operating under the laws

of the United States, and any bank the deposits of which are insured by the Federal Deposit Insurance Corporation.

* * * * *

(g) As used in this section the term "savings and loan association" means any Federal savings and loan association and any "insured institution" as defined in section 401 of the National Housing Act, as amended, and any "Federal credit union" as defined in section 2 of the Federal Credit Union Act. As amended Apr. 8, ????, c. 164, 66 Stat. 46; Sept. 22, 1959, Pub.L. 86-354, § 2, 73 Stat. 639.

* * * * *

§ 2. PRINCIPALS

(a) Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal.

(b) Whoever causes an act to be done, which if directly performed by him would be an offense against the United States, is also a principal and punishable as such.

* * * * *

§ 371. CONSPIRACY TO COMMIT OFFENSE OR TO DEFRAUD UNITED STATES

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701.

18 U.S.C. 3500

* * * * *

§ 3500. DEMANDS FOR PRODUCTION OF STATEMENTS AND REPORTS OF WITNESSES

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States

to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d), of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement. Added Pub.L. 85-269, Sept. 2, 1957, 72 Stat. 595.

* * * * *

U.S. CONSTITUTION—AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

* * * * *

Appendix D—Statutes Involved

U.S. Constitution—Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him, to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

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No. [redacted] 106

In the Supreme Court of the United States

October Term, 1968

DAVE EVANS,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1967

NO.

DAVE EVANS,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To The Honorable The Chief Justice and Associate Justices of the Supreme Court of the United States:

The Petitioner, Dave Evans, prays that a Writ of Certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit in the above case.

JUDGMENT AND OPINION OF THE COURT BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit in the above-entitled cause, dated January 9, 1968, affirmed the judgment of conviction.

The opinion of the Court of Appeals (not yet reported) is reprinted as Appendix A, *infra*. The judgment order of the Court of Appeals was entered January 9, 1968, and is reprinted as Appendix B, *infra*. A Petition for Rehearing En Banc was timely filed but was denied by order dated April 17, 1968, which order is reprinted as Appendix C, *infra*.

JURISDICTION

The judgment of the Court of Appeals was entered on January 9, 1968, Appendix B, *infra*. Petition for rehearing was denied on April 17, 1968, Appendix C, *infra*. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether under *Krulewitch* v. *United States*, 336 U.S. 440 (1949) and *Ingram* v. *United States* 360 U.S. 672 (1959), a conviction for conspiracy to violate the Hobbs Act, 18, U.S.C. §1951, can be sustained on the theory of guilt by association where there is no proof of knowledge of or acquiescence in the unilateral extortionate act of a co-defendant.

2. Are the principles of *Michelson* v. *United States*, 335 U.S. 469 (1948) violated when the District Court refuses to allow evidence of the defendant's good reputation in the business community when the crime charged relates to improper activities in that business?

3. Was the petitioner deprived of his right of cross-examination, guaranteed by the Sixth Amendment to the Constitution, when he was denied access to the grand jury testimony of important government witnesses, prohibited from determining the addresses of these witnesses, and from inquiring into their motives in testifying?

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

18 U.S.C. § 1951, reads in part:

"§ 1951. *Interference with commerce by threats or violence.* (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement or any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years or both.

(b) As used in this section—

(1) The term 'robbery' means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term 'commerce' means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction."

STATEMENT OF THE CASE.

The substance of the indictment was that petitioner, Dave Evans, together with two others, Joseph Amabile and Salvatore Battaglia,[1] were indicted for conspiracy to violate the Hobbs Act, Title 18, U.S. Code, Section 1951. The one-count conspiracy indictment charged that the three defendants, together with alleged co-conspirators, non-defendant Rocco Pranno, conspired "to obstruct, delay and affect commerce" in the construction of multiple dwelling units in Lansing, Illinois, and to obstruct "the movement in interstate commerce of materials, supplies and other commodities required for the construction, sale, rental and management of the units, and to attempt to do so by extortion."

The indictment alleged that the conspiracy began "in or about July, 1964" and continued to the time of the filing of the indictment, February 16, 1967. It charged that as part of the conspiracy the defendants and co-conspirator "would attempt to obtain and did obtain property to the value of $48,500 in the form of money, from the Riley Management Corporation . . . induced by the wrongful use of fear in that the defendants and co-conspirator by threatening language did put and attempt to put William Riley in fear of bodily harm and in fear of his personal safety and security and did threaten economic harm to the Riley Management Corporation and to William Riley" unless and until Riley would cause the payment of the money to the defendants and co-conspirator by the Riley Management Corporation (A. 19-21).

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[1] Separate Petitions will be filed by these defendants.

STATEMENT OF THE FACTS

(a) Evidence of The Three Government Witnesses Relating to the Alleged Conspiracy.

William Riley was President of the Riley Management Corporation. (A. 489). His company was building the King Arthur project, a group of apartment buildings, in Lansing, Illinois. Petitioner Dave Evans was his superintendent of construction on that job (A. 501).

In June, 1964, Riley had a conversation with Evans in which he told Evans that the Lansing job was to begin and that Evans was to let the sewer contract. Riley told Evans that he did not want the people from Melrose Park, especially Amabile and Palermo, to know of this Lansing project (A. 502-3). A few days later, Palermo contacted Riley about the work on the Lansing project (A. 503).

In late July or early August, 1964, Amabile, DiVito and Pranno met. DiVito had been in the sewer contracting business for a number of years. Amabile told DiVito and Pranno that they could get the sewer and water mains contract of the Lansing project if they could come up with a "good clean fellow" to head the job (A. 124).

In mid-September, Pranno and DiVito spoke with LaKey and convinced him to take charge of the company that would have the sewer contract for the Lansing project (A. 126-7)

Later during the month of September, Pranno, DiVito and Evans met at Amabile's apartment and Pranno informed Amabile that they had a "good clean fellow", LaKey. Amabile then said he would give them the job but that he wanted $20,000 "off the top" from them. Pranno agreed to give Amabile the money (A. 128-9, 256).

Government witnesses Mike DiVito, Henry LaKey and an unindicted alleged co-conspirator, Rocco Pranno, formed the Carlson Construction Company in October, 1964, for the purpose of bidding on and getting the sewer construction job (A. 130-132).

Pranno loaned Carlson Construction Company approximately $13,000 for its initial bank deposit in order to start business (A. 273). Some $12,090 of that initial money was deposited by LaKey to the account of Carlson Construction Company in October, 1964 (A. 273). Pranno, DiVito and LaKey borrowed an additional $5,000 in cash for the Carlson Construction Company account (A. 146).

The Carlson Construction Company commenced operations. It put in the pipes, water lines and water pumping lifts (A. 287-8).

Because of urgencies, shipments were made to the project in Lansing, Illinois, quite rapidly from the Granco Steel Company, St. Louis, Missouri. "These shipments had been expedited rather than delayed." They were sent earlier to Lansing from Missouri than was normally done (A. 108).

DiVito and Pranno informed Amabile that they would need more money on the job if Amabile was to get his $20,000. Amabile instructed Evans to "jack up" the price of the contract. Evans did so by preparing another bid some $40,000 to $45,000 higher (A. 310). There was no need to "jack up" the prices of the construction if extortion was to be the means to obtain money.

In November, 1964, Amabile instructed LaKey to make the first draw from the Riley Company. LaKey drew up the papers calling for a draw of $55,000 (A. 537). However, Evans reworked the figures and arrived at the amount of $47,517.97 (A. 302).

On November 12, 1964, LaKey obtained the first draw from the Riley Company for its work in the amount of $47,517.97 (A. 303). LaKey deposited $39,000 in the Carlson bank account, keeping $8,517 (A. 304). He said he gave Pranno $8,000 in cash, retaining $517 himself for two weeks of his salary (A. 305).

At Amabile's request, LaKey withdrew $20,000 in cash and gave it to Amabile on November 15, 1964 (A. 306-7).

LaKey and Amabile visited Evans, who was a patient in a hospital, and Amabile gave Evans a "wad of money" (A. 301).

Numerous conversations took place where Amabile instructed DiVito, LaKey, Pranno and Evans that Riley was not to learn of Pranno and Amabile's connection with the Carlson Construction Company. Amabile also told these men that Riley was not to know that Evans was in any way connected with the Carlson Construction Company (A. 140, 143, 281, 286, 347).

After the first draw had been made, LaKey complained to Evans that he was unable to pay his bills, and Evans allegedly told LaKey not to worry and stated: "I'll talk to Joe Shine and Joe Shine will talk to the man. We will see that the money is in the bank for you." (A. 342). This conversation again emphasized that Evans was intent on receiving money for the Carlson Construction Company so that the work could continue and the bills could be paid.

LaKey made a request for a second draw of $48,500 in early January, 1965 (A. 345). Riley's controller, one Sol Meltzer, refused to authorize a payout. Riley told LaKey that he would not authorize the payout because he learned that the suppliers on the job were not being paid (A. 349).

LaKey then told Amabile in Evans' presence that the second payout draw was turned down by the Riley people (A. 346). Amabile told Evans that he wanted Evans to go with LaKey to the Riley office the following morning (A. 346). The next morning, Evans suggested to LaKey that they should enter the Riley offices separately (A. 347). Evans and LaKey spoke with Riley concerning the second draw and Evans said that complications had developed on the job (A. 350), Riley again turned down LaKey (A. 351).

LaKey again returned to Amabile and informed him that Evans and he had been turned down by Riley (A. 351). At this meeting, Evans was not present. Amabile then told LaKey, "You be here tomorrow morning. I'll personally go with you to the office myself. I'll get this straightened out once and for all." (A. 351).

The next day, Amabile and LaKey went to the offices of the Riley Company in Bellwood, Illinois and talked to Riley. Riley told Amabile that they couldn't pay because to do so would jeopardize his position with the lending institution. According to Riley, Amabile told Riley that he had to pay LaKey, that LaKey was a friend of theirs; and that, if he didn't pay, "all sorts of people would get mad" (A. 533). Amabile said that Riley had no choice in the matter, that he had to pay LaKey, that "the man" wanted him paid. Evans was not present at this meeting (A. 534-5).

Subsequently, Riley authorized the payout by Lawn Savings and Loan Association to Carlson Construction Company in the approximate amount of $48,500, the payment alleged in the indictment to have been extorted from him.

Riley testified that he authorized this payment because he was afraid of Amabile. Over objections, he testified he was afraid because, "in previous meetings I had been threatened repeatedly. I had been at numerous, numerous meetings, where I was threatened with physical harm, harm to my family, collapse of the company, ruination, employees threatened." (A. 536-8).

Over objections, Riley stated that Amabile and Nick Palermo (not referred to in the indictment anywhere) threatened him (A. 538-9).

Riley testified that as late as October, 1965, he thought Evans was a very fine man (A. 730).

From the second draw which LaKey received, he said he withdrew $17,000 for Amabile (from which LaKey got $5,000) (A. 358-361).

LaKey had gone to Florida after the payment of the second draw and was called there by Evans. Evans told him that there had been trouble on the job and that Amabile wanted to see him (A. 361).

LaKey returned from Florida and in the presence of Evans, Amabile told LaKey, "You're not paying the bills, you're not taking care of the job. You got me in trouble with Riley. Riley's in trouble. You're making Dave Evans lose his job. You're taking my man right out of Riley's. I don't know what is going on. You are causing nothing but trouble." (A. 361-2). Since LaKey was present at the time of Amabile's threat, this conversation is an indication that even at this late date Evans was not aware of the threat and that Amabile was deliberately keeping knowledge of the threat from him.

(b) Evidence of Palermo-Amabile Threats Not Anywhere Alleged in the Indictment.

Riley testified that in April, 1962, he was in the offices of Nick Palermo's Melrose Park Plumbing Company. Palermo asked him about a proposed building project in Northlake, Illinois, and Amabile told Riley that he, Amabile, was the man in Northlake and that Riley was not going to build in Northlake without his permission. Amabile told Riley it would cost him $70,000 (A. 546). A number of subsequent meetings were held with Palermo and Amabile in 1962 and at one of these Amabile asked Riley if he had the $70,000. Riley said he did not. Palermo said that he had the ability to stop the project of Riley's then being constructed in Addison, Illinois. Riley said he could not pay $70,000. Amabile said to give him $30,000 in cash and $40,000 in checks. Subsequently, Riley paid Amabile $30,000 in cash (A. 548-557).

Riley testified that in September, 1963, Palermo and Amabile talked to him about the plumbing work for a project in Westmont, Illinois. Amabile told Riley he must give the plumbing work to Palermo. Riley objected to the quality of Palermo's work. Amabile told Riley that he was "nothing but a wise guy and he would handle [him] with a baseball bat if [he] didn't stop trying to be a wise guy" (A. 563-4). Riley asked to leave; Amabile told him he could not do so. They said that Riley's construction superintendent, one Hubley, was the cause of all the problems. Palermo said that he would bury Hubley, and Amabile added that he would hammer the nails in Hubley's coffin (A. 564). Then Amabile told Riley that he knew where Riley's mother lived, where his children went to school, and that he would need a candy cane from then on out if they did not get the plumbing contracts (A. 565).

(c) Evans-Battaglia.

Evans did not know, nor had he ever met Battaglia during the period of the alleged conspiracy. Evans first met Battaglia in 1967 on the day this case was first called in court (A. 853-4).

(d) The Defense.

The petitioner, Evans, testified in his own behalf. Though he was precluded from denying many of the important alleged conversations and occurrences and from introducing affirmative evidence of his innocence, Evans did make a general denial that he was not involved in the crime charged in the indictment (A. 919-920). Evans also testified that he never received any money from Amabile as alleged by the Government witnesses (A. 901).

Evans testified that he was 52 years old and that he had been gainfully employed in the construction business since he had been 18 years old. He had served with the United States Army and had received an honorable discharge. He had never been arrested (A. 850-1).

Evans also attempted to introduce evidence of his good reputation in the buisness community through four (4) witnesses who had known him for a long period of time. This evidence was declined by the trial judge (A. 811, 816, 820, 839).

REASONS FOR GRANTING THE WRIT

1. Under Krulewich v. United States, 336 U.S. 440 (1949) and Ingram v. United States, 360 U.S. 672 (1959), a conviction for conspiracy to violate the Hobbs Act, 18 U.S.C. §1951, cannot be sustained on the theory of guilt by association where there is no proof of knowledge of or acquiescence in the unilateral extortionate act of a co-defendant.

A.

The decision of the court below is based on the theory of guilt by association, specifically warned against by this Court in *Krulewitch* v. *United States,* 336 U.S. 440 (1949) (Jackson, J., concurring). Upon evidence of an association with a person who has in the past been "evil," a man is deemed to be accountable for any "evil" act that this associate may perpetrate.

Conceding that the petitioner was not aware of Amabile's extortion, the court below relied upon the evidence that "On this record, it is obvious that Evans knew of Riley's fear of Amabile . . . It would be unreasonable to suppose that Evans would be so closely associated with Amabile in the scheme to defraud without realizing that Amabile would be employing coercive means for obtaining a second draw." (Appendix A page 9 *infra*). The potential for abuse of this "birds of a feather" doctrine is unlimited. Mere association replaces the fundamental principle of *agreement* in the law of conspiracy. This theory should be considered as one of the "attempts to broaden the already pervasive and widesweeping nets of conspiracy prosecutions," *Grunewald* v. *United States,* 353 U.S. 391 at 404 (1957).

The danger inherent in the association theory is particularly evident in the case against the petitioner; even according to the government evidence, the petitioner was an unwilling and reluctant associate of Amabile. (App. 364). Further, the circumstances of Evans' relationship with Amabile would lead Evans to believe that Amabile intended to use non-violent means to obtain money from the Riley Management Corporation.

Viewing the evidence in the light most favorable to the Government, the petitioner knew that Amabile had arranged for Henry LaKey, a "good, clean fellow," to head the Carlson Construction Company. (App. 128-9). Amabile had also obtained the services of DiVito, a knowledgeable sewer contractor, who could actually perform the contract behind the facade of the Carlson Corporation. Evans knew that the contract prices were raised to insure all the co-conspirators receiving their share in excess of the costs of completing the contract work. Evans knew that Amabile stressed that Riley should never find out that Amabile or Pranno were in any way connected with the Carlson Construction Company. (A. 140, 143, 281, 286, 347). There was to be no direct contact between Amabile and Riley. These circumstances of necessity led Evans to believe that Amabile did not intend to repeat whatever actions had made Riley fear Amabile in the past.

In *Carbo* v. *United States,* 314 F.2d 718 (9th Cir. 1963), a conspiracy to violate the Hobbs Act, the court reversed the conviction of the defendant Dragna even though the victim testified that he actually feared Dragna as being connected with the underworld and associated Dragna's appearance with the extortionist, Carbo's, threat. Though Dragna had a discussion with the victim, in which he told the victim "you are dealing with . . . big people and if your

word is no good you are no good in this game," there was no evidence that he knew of or participated in the actual threat. The Court rejected any suggestion that "those having an underworld reputation have the burden of refraining from acting in such a fashion (or, it would seem, from being seen in association with others) when it might be construed as evincing an interested participation or threat of violence." Certainly if a man like Dragna who was actually feared himself is not to be deemed guilty because of his association with men who in fact commit extortion, the non-violent petitioner should not be convicted because of the knowledge that his associate was feared by the victim in the past.

The court below's misplaced reliance on the precedents of *Pereira* v. *United States,* 347 U.S. 1 (1954) and *Lefco* v. *United States,* 74 F.2d 66 (3rd Cir. 1934), to support its guilt by association theory demonstrates its misunderstanding of the conspiracy concept. This Court's decision in *Pereira* stands only for the evidentiary rule that if there is sufficient evidence of agreement to commit the crime charged, a co-conspirator is responsible for the acts and declarations of another co-conspirator which could have been reasonably foreseen to be necessary to carry out that conspiracy. *Pereira* does not stand for the boot strap method of proving the conspiracy itself by means of assumption and references based on association.

The court below has done exactly what the court in *United States* v. *Peoni,* 100 F.2d 401 (2nd Cir. 1938) warned against. In *Peoni,* the court said:

> "at times it seems to be supposed that once some kind of criminal concert is established, all parties are liable for everything any one of the original participants does, and even for what those do who join later. Nothing could be more untrue. . . . The confusion is

> perhaps due to the fact that everything done by the conspirators—including the declarations of later entrants—is competent evidence against all, so far as it may fairly be thought to be in an execution of the concert to which the accused is privy, though that doctrine too is often abused."

This confusion in the court below has resulted in petitioner's conviction and in an illogical theory of the law of conspiracy.

B.

In its opinion, the court below further expanded the theory of guilt by association when it removed the requirement of the limitation of the scope of a conspiracy based on the determination of the common understanding, an aspect of specific intent. In so doing, the Seventh Circuit is in conflict with the Second Circuit, *United States* v. *Crimmins,* 123 F.2d 271 (1941), the Ninth Circuit *Twitchell* v. *United States,* 313 F.2d 425 (1963), the Sixth Circuit, *United States* v. *Barnes,* 383 F.2d 287 (1967) and, it is submitted, with this Court in *Ingram* v. *United States,* 360 U.S. 672 (1959).

The decision below held that a man who "embarked on a criminal venture of indefinite outline" has to "take his chances as to the methods used by the other co-conspirators." (Appendix A Page 11 *Infra*)

The evidence against the petitioner showed he entered into an agreement with Amabile, Pranno, DiVito and LaKey to obtain money from the Riley Management Corporation by fraud and deceit. However, the charges for which he stands convicted were of a conspiracy to extort by means of threats and violence.

The basis of the proven plan or agreement was secrecy and misrepresentations. All conspirators agreed that the one essential ingredient of success in this scheme was that

Amabile's connection with Carlson Construction Company was not to be revealed to Riley and that Amabile was to have no direct contact with Riley. How can a man's criminal responsibility rest on the assumption that he took "his chances" on activity that was in direct conflict with the agreed method of the scheme?

In *United States* v. *Crimmins,* 123 F.2d 271 (2d Cir. 1941), Judge Hand faced the interlocking problems of scope, the hearsay exception, and intent. He pointed out that although

> each conspirator is chargeable with the acts of his fellows done in furtherance of the joint venture; [the] . . . acts so imputed must be in execution of the venture as all understand it; not indeed in its details, but so far as concerns those terms which constitute the substantive crime. *It is never permissible to enlarge the scope of the conspiracy itself by proving that some of the conspirators, unknown to the rest, have done what was beyond the reasonable intendment of the common understanding.* . . . (Emphasis added.)

This court held in *Stirone* v. *United States,* 361 U.S. 212 (1960) that indictments charging violations of the Hobbs Act must be narrowly construed. The requirement in a Hobbs Act conspiracy of an actual agreement for violence was stressed in *Carbo* v. *United States,* 314 F. 2d 718 (9th Cir. 1963). In speaking of the defendant Gibson, the court said at Page 734:

> "As to Appellant, Gibson, charged in the conspiracy counts, it must be noted that there are in fact two distinct conspiracies involved in the facts of the case. (1) The underlying conspiracy to gain control of Jordan. For business reasons of his own, Gibson was interested in furthering Carbo's ends in this respect

> and it is clear that the evidence is sufficient to connect him with this underlying conspiracy. (2) *the charged conspiracies to accomplish the underlying purpose by extortion and threatening communications.*
>
> The United States suggests that proof of the first is sufficient without more to constitute proof of the second. This is vigorously disputed by Gibson, who contends with justification that the existence of business relations with Carbo is in itself wholly consistent with innocence of the charged conspiracies . . . There can be little doubt that Gibson had his own business reasons entirely apart from those of Carbo and Palermo for wishing such a fight to take place. *The question is whether the record can support a determination that for these independent business reasons Gibson became a party to the Carbo-Palermo scheme for achieving control of Jordan through extortion and threats.*" (Emphasis added).

The evidence shows no *agreement* between the petitioner and Amabile to obtain money by means of threats or violence and without evidence of such an agreement a Hobbs Act conspiracy charge should not be sustained.

This court in *Ingram* v. *United States,* 360 U.S. 672 (1959) rejected an attempt to create a federal conspiracy violation where only a state substantive crime existed. This court at page 680 stated

> Without the knowledge, the intent cannot exist. . . . Further, to establish the intent, the evidence of knowledge must be clear, not equivocal. * * * This, because charges of conspiracy are not to be made out by piling inference on inference, thus fashioning * * * a dragnet to draw in all substantive crimes.

This Court should again denounce the unbridled expansion of federal conspiracy jurisdiction.

2. The principles of Michelson v. United States, 335 U.S. 469 (1948) are violated when the District Court refuses to allow evidence of the defendant's good reputation in the business community when the crime charged relates to improper activities in that business.

Evidence of a defendant's character and reputation is one of the most vital strongholds in his defense. This Court has long recognized the importance of character evidence and in *Michelson* v. *United States,* 335 U.S. 469, 476 (1948) said, "This principle [of presenting character testimony] is sometimes valuable to a defendant for . . . such testimony alone . . . may be enough to raise a reasonable doubt of guilt . . ."

A declination by the trial court of a defendant's offer to prove his general reputation for honesty and integrity and truth and veracity, is reversible error. *Carnley* v. *United States,* 274 F.2d 69 (5th Cir. 1960)

The four character witnesses who testified in this case had known petitioner from five to twelve years. They had worked with him and were constantly in contact with him and other men in the community who had known and worked with him. The witnesses testified that they had discussed Evans with these other men. The witnesses were then asked if they knew Evans' general reputation in the community for honesty and integrity, truth and veracity and as a law abiding citizen. However, on approximately 24 occasions the trial court sustained the Government's objections to these questions (A. 811-16, 816-20, 820-27, 839-47).

The decision of the court below stated ". . . As to some of the questions, this may have been an overstrict application of *Michelson.* However, *no foundation was laid to show that these witnesses knew any of the people who lived*

in the community where Evans resided. Proof of reputation 'among a limited group such as fellow employees in a particular building' has been held inadmissible. 335 U.S. at p. 481, note 17; *Williams* v. *United States,* 168 U.S. 382, 397; *Kroot* v. *United States,* 66 F.2d 449, 451 (7th Cir. 1933). Although a more liberal approach to character witness rulings has precedential basis, we adhere to Mr. Justice Jackson's precept not to 'disturb rulings of trial courts' in this troublesome field except in rare instances (335 U.S. at p. 480)." (Emphasis added) (Appendix A, Page 22 *Infra*)

This limitation of character evidence to the geographical area in which a man lives is unrealistic in view of the complex and everchanging society of today.' This Court should recognize that a man's reputation at the place of his day-in, day-out business is likely to be even more probative of his true character. In this regard Professor McCormick's statement is relevant:

> The reputation is usually said to be limited to that which obtained in the community where the accused lived, but this should be extended to embrace any considerable group with whom he constantly associated in his business, work, or other continued activity, and who might reasonably be thought to have a collective opinion about him. C. McCormick, Handbook of the Law of Evidence § 158 at 335 (1954)

See also *Whiting* v. *United States,* 296 F.2d 512, 517 (1st Cir. 1961) and Am. Jur. Proof of Facts Annotated Character and Reputation Notes, Page 185.

In *United States* v. *White,* 225 F.Supp. 514 (1963) the court said at page 522,

> "The community in which a man lives is not necessarily a geographical unit, but is rather composed of those

> relationships with others which arises where a man works, worships, shops, relaxes, and lives. Evidence tending to show a defendant's reputation in such places is no more difficult to establish than his reputation in his particular city-block, which may or may not be important in establishing the defendant's reputation."

Evidence of reputation in the business community was particularly crucial to the petitioner since his criminal activity was allegedly against his employer. The petitioner was portrayed as a disloyal employee of Riley. When a defendant's reputation involves a trait which affects the very charge against him, a trial court exclusion of such evidence is error. *Robinson* v. *United States,* 156 F.2d 574 (D.C. Cir. 1946).

This case affords an opportunity for this Court to enunciate the principle that a defendant is entitled to introduce evidence of his reputation of good character in the business community in which he works.

3. The petitioner was deprived of his right of cross-examination guaranteed by the Sixth Amendment to the Constitution when he was denied access to the grand jury testimony of important government witnesses, prohibited from determining the addresses of these witnesses and from inquiring into their motives in testifying.

This court recently stated in *Pointer* v. *Texas,* 380 U.S. 400, 405 (1965):

> There are few subjects, perhaps, upon which the Court and other courts have been more nearly unanimous than in their expressions of belief that the right of

> . . . cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal.

The three most important witnesses for the Government were DiVito, LaKey and Riley. The defense contended that the credibility of each of these individuals was subject to serious question. The testimony of these witnesses concerning conversations and oral statements made in various meetings were largely uncorroborated. DiVito and LaKey were accomplices, and Riley had definite reasons for hostility towards the petitioner.

Counsel for the defendant Amabile moved for the production of the grand jury testimony of the witness DiVito. The District Court asked counsel to provide him with authorities for its production (A. 195). Counsel for Battaglia called the trial court's attention to this Court's ruling in *Dennis* v. *United States,* 384 U.S. 855 (A. 233). However, the trial court informed all counsel that this motion was denied (A. 390). A similar motion for production of Riley's grand jury testimony was denied in the same manner (A. 689).

The opinion of the court below holds that "no particularized need for this testimony was shown, nor was there any showing that the ends of justice required production." (App. A, p. 20 *infra*).

It is submitted that this request for grand jury testimony came within the scope of *Dennis* v. *United States* and is in conflict with the decisions of Courts of Appeals in at least four other circuits. See: *United States* v. *Youngblood,* 379 F.2d 365 (2nd Cir. 1967); *Schlinsky* v. *United States,* 379 F.2d 735 (1st Cir. 1967); *Cargill* v. *United States,* 381 F.2d 849 (10th Cir. 1967); *Worthy* v. *United States,* 383 F.2d 524 D.C. Cir. 1967.

Counsel for the defendant Battaglia made inquiry into the residence of the witness Riley. When Government counsel objected and asked to be heard out of the presence of the jury, the trial court sustained the objection without a hearing (A. 723). This ruling is contrary to the decision of this Court in *Smith* v. *Illinois,* 390 U.S. 129. This error alone requires a *per curiam* reversal in this case.

Counsel for the defendants attempted to bring before the jury the facts that Riley was under indictment for theft in the State Court and that he was under investigation by the Internal Revenue Service for tax evasion and that his testimony was given in hope of securing favorable treatment from local and federal law enforcement officers concerning his illegal conduct (A. 615, 617-8). Professor McCormick has commented:

> The law recognizes the slanting effect upon human testimony of the . . . self-interest of the witness in the outcome of the case. Any such partiality, proceeding from any acts, relationships or motives, may be proven to impeach credibility . . . . [one such instance is] in a criminal case when the witness testifies for the state and it is shown that an indictment is pending against him . . . C. McCORMICK HANDBOOK OF THE LAW OF EVIDENCE, §40, at 82, 83, 84 (1954)

See *Harris* v. *United States,* 371 F.2d 365 (9th Cir. 1967); *Wheeler* v. *United States,* 351 F.2d 946 (1st Cir. 1965); *United States* v. *Masino,* 275 F.2d 129 (2d Cir. 1960). As the Second Circuit observed in *Masino:*

> Cross-examination is proper when its purpose is to reveal bias or interest on the part of the witness being examined . . . . It was highly relevant and material to bring out that the state court charge . . . had been quashed upon the intercession of the Assistant United States Attorney as was claimed by the defense and not denied by the government. This is the kind

> of situation where the widest possible cross-examination should be permitted. The appellant was entitled to have the jury know what had happened with respect to the charge, including any part which representatives of the government had played, so that the jury could draw its own conclusions with respect to possible motives for Brown's testimony. 275 F.2d at 132.

It is obvious that the atmosphere in the courtroom was such that petitioner and the other defendants were denied effective use of their right of cross-examination guaranteed by the Sixth Amendment to the Constitution.

CONCLUSION

For the foregoing reasons, petitioner respectfully submits that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

SEPTEMBER TERM, 1967 JANUARY SESSION, 1968

Nos. 16312 and 16313
UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

SALVATORE BATTAGLIA and
DALE EVANS,
Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

January 9, 1968

Before SCHNACKENBERG, SWYGERT and CUMMINGS, *Circuit Judges.*

CUMMINGS, *Circuit Judge.* In February 1967, defendants Dave Evans, Salvatore Battaglia and Joseph Amabile were indicted for conspiring with each other and with non-defendant Rocco Pranno to violate the

Hobbs Act.[1] The gist of the conspiracy charge was that defendants obtained $48,500 from the Riley Management Corporation by extortion. As required by the statute, the indictment also charged that the conspiracy affected interstate commerce, particularly with respect to that firm's construction of the King Arthur Apartments in Lansing, Illinois. The three defendants were found guilty by a jury. Evans' and Battaglia's appeals were heard together and are disposed of in this opinion. Amabile's appeal has not yet been heard.

Because Evans and Battaglia assail the sufficiency of the evidence, it must be summarized in some detail, viewed in the light most favorable to the Government. The evidence showed that William Riley was president of the Riley Management Corporation and that his company was building the King Arthur Apartments in Lansing, Illinois. Since 1962, defendant Evans had been one of his superintendents of construction and was assigned to the Lansing job in June 1964. At that time Riley and Evans discussed letting the sewer contracts for the Lansing apartments. Riley

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[1] In pertinent part, the Hobbs Act provides (18 U.S.C. § 1951):

"(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

"(b) As used in this section —

* * *

"(2) The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right."

told Evans to line up subcontractors but to keep it secret "from the boys in Melrose Park, specifically from defendant Amabile (also known as Joe Shine) and from Nick Palermo. Riley told Evans that if Amabile and Palermo learned of the project, Riley would quite possibly be forced to use them again as subcontractors. Amabile had been connected with earlier Riley projects and had on several occasions threatened Riley and his family. Evans promised to keep the King Arthur Apartment information from Amabile and Palermo. However, a few days later, Riley was requested to go to the office of the Melrose Park Plumbing Company to meet Nick Palermo. Riley acceded. Both Palermo and Amabile were at the meeting. Palermo insisted on their receiving the plumbing contract for the Lansing project. Amabile said that otherwise he would stop Riley's other apartment building projects underway in Northlake and Westmont, Illinois, and that Riley "would be walking the streets with a candy cane." They told him they knew where Riley's mother lived and where his children went to school and that they had a baseball bat to handle "wise guys" like him.

A few days later, Riley complained to Evans about the leak to Amabile and Palermo. Riley told Evans that the Melrose Park group was not to receive any Lansing work from Riley Management Corporation. In August 1964, Riley instructed Evans to obtain a sewer contractor that was "foreign" to Amabile and Palermo.

Amabile had told Mike DiVito, a sewer contractor, that Amabile could not get the Lansing sewer work if DiVito's name were to be on the contract. Amabile advised DiVito and co-conspirator Rocco Pranno to come up with "a good clean fellow" if they were to obtain the business. They suggested Henry La-Key, an experienced construction fore-

man. In September 1964, La-Key was hired by Pranno and DiVito as construction superintendent for a brand new firm, Carlson Construction Company, with the title of president.

DiVito said he and Pranno met with Evans and Amabile at Amabile's apartment in mid-September.[2] Pranno explained to Amabile that La-Key was "clean," but Amabile said that before giving Pranno and DiVito the Lansing sewer job he wanted $20,000 in cash. After looking at Evans' figures, DiVito told Pranno that there would be $20,000 in cash above Pranno's and DiVito's costs and profits for the job. Thereupon Pranno told Amabile that he would give him the $20,000 in cash and Amabile accepted the deal. Afterwards, Pranno told DiVito that Evans was Amabile's "guy" and that DiVito should never say anything in front of Evans because it would get back to Amabile.

La-Key testified that he attended a September meeting at Amabile's apartment with Evans, DiVito and Amabile. Amabile said that he was giving the Lansing sewer job to DiVito and Pranno and cared about nothing except getting his $20,000 "off the top." In La-Key's presence, DiVito later relayed the message to Pranno about Amabile's demand for $20,000. Pranno directed La-Key and DiVito to meet with Amabile and Evans at the El Morocco lounge. At that meeting DiVito told Amabile that there would not be enough money in the contract to pay him $20,000 "off the top." Amabile then instructed Evans to figure a way to obtain more money from the job. Evans tore up the original contract and wrote a new contract, raising the price from $150,000 to $199,600.

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[2] This may be the same Amabile apartment meeting described *infra* by La-Key.

Pranno gave DiVito and La-Key approximately $13,000 to open a bank account for Carlson. In September 1964, Evans advised Riley that he had selected the Carlson Construction Company as the sewer contractor, that its reputation was excellent, and that it was operated by Henry Le-Key. Thereafter, Carlson Construction Company was awarded the sewer contract for about $150,000, to be paid directly to Carlson by a suburban savings and loan association through pay-out slips issued by Riley's company. Carlson commenced the Lansing work in September or October 1964.

In mid-October, Evans told La-Key that the only contracts Evans let at Lansing were the ones Amabile told him to. Evans told La-Key that he did not want Riley to know that Evans knew Amabile. In November, Amabile told La-Key that Evans worked for Amabile, that Amabile had placed Evans in Riley's office, and that Evans would do whatever Amabile told him to do.

Before making the first draw from the savings and loan association, LaKey told Amabile that the draw would be for $57,000. The next day, Amabile and La-Key drove to the hospital where Evans was a patient. Amabile told La-Key that Amabile was going to give $5,000 to Evans as his cut on the job, instead of $7,500. At the hospital Amabile gave Evans a "wad of bills." Evans reduced the estimate for the first draw by approximately $10,000.

On November 12, 1964, La-Key received the first draw for $47,517.97 from the savings and loan association. He deposited $39,000 in Carlson's payroll account, retained $517 for his wages, and gave $8,000 to Rocco Pranno. Three days later, on Amabile's instructions, he drew out $20,000 from Carlson's account and gave it to Amabile.

In late November or early December, La-Key accompanied Amabile to a farm in Pingree Grove, Illinois, where Amabile introduced La-Key to Battaglia as "running the job for them" in Lansing, Illinois. La-Key heard Battaglia ask Amabile why Evans was getting "that kind of money." Amabile explained that he had made a deal with Evans who had "got us the job." Amabile also said he had promised Evans $7,500 and that he would take care of it. The next morning La-Key mentioned to Evans that he had been at Battaglia's farm, and Evans warned him not to talk about it. Later, Pranno explained to Amabile that La-Key should not have been taken to the farm. When Pranno attempted to hit La-Key, Amabile stopped him, saying that he had La-Key down to the farm and that "the man [Battaglia] says he is OK."

Prior to the first draw, Pranno, DiVito and La-Key borrowed $5,000 because Carlson had run short of money. Pranno gave $4,500 of this amount to La-Key to deposit for Carlson. This loan was not repaid by January 1965. Later that month Pranno told Amabile about this in DiVito's presence and asked Amabile to locate La-Key so that the loan could be repaid. Several days later Pranno told Amabile that he was going to "the farm" to see "the man" in order to have Amabile obtain $5,000 from La-Key to pay back the loan. At the resulting Battaglia farm meeting, attended by Amabile, Pranno and DiVito, Pranno mentioned that $20,000 from the Lansing sewer job was intended for Battaglia, who then nodded. The second time the $20,000 was mentioned for Battaglia, he said "yes." Battaglia also said:

> " 'Well, I don't think Hank La-Key is such a bad guy, I like him, I like to work with him,' that they had other things coming up, and that they could use him again because he was clean."

He told Pranno that he would see what he could do for him as to the $5,000. On the drive back from the farm, Pranno told DiVito that he thought Amabile was short-changing Battaglia and keeping $10,000 of the $20,000 for himself.

In January 1965, LaKey advised Evans that Carlson did not have enough money to pay for necessary materials. Evans told La-Key not to worry, saying:

> "' 'I will talk to Joe Shine [Amabile] and Joe Shine will talk to the man [Battaglia or Riley[3]]. We will see that the money is in the bank for you.' "

That same month Amabile told La-Key to prepare the papers for the second draw. La-Key said that the second draw would be for $60,000. Amabile said this was too high and that he would determine how much it should be and would straighten it out with Evans. That same night, Evans went to La-Key's home and changed prices to bring the draw down to $48,000. Evans told La-Key to present the second draw papers to Sol Meltzer, Riley's financial officer. However, Meltzer refused to authorize this draw. Thereupon, La-Key went to see Amabile. Evans was present while La-Key told Amabile what had happened. The next morning La-Key picked up Evans. They entered Riley's office separately. Riley said that he would authorize a pay-out only when Carlson had paid its suppliers. At this meeting La-Key told Riley that the cost of the job had gone up to $200,000. Evans explained that this was because "complications set in on the job."

La-Key thereupon reported to Amabile that the second draw was still not authorized. Amabile told La-Key to

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[3] In other instances in the record, the evidence supports a finding that the expression "the man" refers to defendant Battaglia.

accompany him to Riley's office the next morning. On the following day Amabile told Riley that he had to pay La-Key because "the man" [Battaglia] wanted La-Key paid. Amabile said that otherwise there would be "all sorts of trouble." Because of his fear of physical harm and economic collapse, Riley authorized the second draw of $48,512.48. This was the sum mentioned in the indictment and was deposited by La-Key in a Carlson account. A few days later, Amabile instructed La-Key to draw out $17,000. LaKey thereupon obtained $5,000 in cash and a certified check for $12,000. Amabile insisted upon all cash and ordered Evans to accompany La-Key to cash the check. After the $12,000 check was cashed, La-Key and Evans went to Amabile's apartment, and La-Key gave Amabile the $17,000. Amabile then gave La-Key $5,000, of which La-Key gave Evans $1,000. Amabile told La-Key to take a vacation, and he went to Florida. Shortly thereafter, Evans advised La-Key to return to Chicago, at Amabile's request. Amabile then complained that La-Key had not been paying Carlson's bills, thus getting Amabile in trouble with Riley and " 'making Dave Evans lose his job. You are taking my man [Evans] right out of Riley's.' " La-Key than told Amabile that there was no money in the Carlson account because Amabile had bled it.

A few days later, La-Key complained to Evans that the Carlson bills were unpaid because of Amabile's actions. La-Key asked Evans why he didn't get out of the business. Evans replied:

> " 'I can't get out. I am in too deep with Joe Shine [Amabile]. I know too much about the other people. * * * I can't quit. I wish I could get back to my own job where I came from.' "

Evans then said that he wished he had never met Amabile and reiterated that he was in too deep to quit.

Sufficiency of the Evidence as to Evans

Evans and Battaglia concede there was enough evidence of a conspiracy to obtain money from Riley Management Corporation by fraud. Evans admits that there was sufficient evidence that he was a party to that conspiracy. He also admits that Amabile used extortion to induce Riley to authorize the second draw. However, Evans contends that there is no evidence to show that the extortion was pursuant to a conspiracy of which he was a member. We reject that contention.

On this record, it is obvious that Evans knew of Riley's fear of Amabile. Although Evans took the stand, he significantly never explained that violence was not contemplated. La-Key was told by Evans that he would talk to Amabile, and that Amabile would talk to "the man" (Battaglia or Riley in this instance; see note 3 *supra*) in order to get the second draw paid. Evans knew that Riley was unwilling to pay the second draw because Carlson's bills were unpaid, and that Riley was afraid of Amabile. The jury could properly infer that Evans knew Amabile would induce Riley—through fear—to authorize the second draw. After the second draw, La-Key withdrew another $17,000 for Amabile, who then gave La-Key $5,000, who in turn gave Evans $1,000.[4] Even though he may not have spoken to Amabile about the second draw, Evans' own statement to La-Key should his willingness to take part in a course of action which would cause payment by coercion. It would be unreasonable to suppose

[4] Previously, according to La-Key, Evans had received another "wad of bills" from Amabile.

that Evans would be so closely associated with Amabile in the scheme to defraud without realizing that Amabile would employ coercive means for obtaining the second draw. Cf. *Pereira* v. *United States,* 347 U.S. 1, 12-13. As in *Lefco* v. *United States,* 74 F.2d 66, 68, 69 (3rd Cir. 1934), Evans has resorted to a conspirator's common contention, made in extremity, that he was a party to a subconspiracy not charged in the indictment, but our digest of the evidence discloses evidence quite sufficient to sustain the allegations and finding of his participation in a single conspiracy to obtain money, encompassing extortion as well as fraud.

Evans has relied on *Stirone* v. *United States,* 361 U.S. 212; *United States* v. *Critchley,* 353 F.2d 358 (3rd Cir. 1965), and *Carbo* v. *United States,* 314 F.2d 718 (9th Cir. 1963), certiorari denied, 365 U.S. 861. None is apposite. In *Stirone,* the Court condemned the variance between indictment and proof. As we have seen, the proof here is consistent with the indictment. In *Critchley,* the evidence did not show any threat at the critical time, so that there was no extortion. Here there was ample evidence that co-conspirator Amabile threatened Riley with violence to obtain the second draw, and of course Evans is chargeable with his co-conspirator's acts in furtherance of the conspiracy.[5] In *Carbo,* Gibson had legitimate business reasons for his association with the conspirators, where Evans' associations with Amabile were clearly for illegal purposes.

Sufficiency of the Evidence as to Battaglia

As noted above, during DiVito's, Pranno's and Amabile's February (or early March) 1965 visit to Battaglia's

[5] *United States* v. *Sansone,* 231 F.2d 887, 892 (2d Cir. 1956), certiorari denied, 351 U.S. 987.

farm, Battaglia said he liked La-Key and they could use him in other things because he was clean. From this, the jury could infer that Battaglia had embarked "on a criminal venture of indefinite outline" (*United States* v. *Andolschek,* 142 F.2d 503, 507 (2d Cir. 1944)). He was committed to a long-term relationship contemplating the use of La-Key in numerous ventures. Battaglia admitted knowledge of Evans' paid role. He also acknowledged that he was to receive a $20,000 cut from Riley through the Carlson contract at Lansing. Since Battaglia had a stake in the outcome of the conspiracy, even the stringent test of conspiracy liability evolved by Judge Learned Hand in *United States* v. *Falcone,* 109 F.2d 579, 581 (2d Cir. 1940), affirmed, 311 U.S. 205, was satisfied. Battaglia was also the arbiter of disputes among the co-conspirators. Being an associate of Amabile in this venture, Battaglia is properly chargeable with knowledge that his confederate, Amabile, would resort to threats if necessary to extract money from Riley. Battaglia had to "take his chances" as to the methods used by the other co-conspirators, *United States* v. *Andolschek, supra.* As in *United States* v. *Kahaner,* 317 F.2d 459, 468, note 4 (2d Cir. 1963), certiorari denied, 375 U.S. 835, 836, "there was ample evidence to raise a question for the jury whether he had joined in the conspiracy; if the jury so found, he [a co-conspirator who held the bribe money] was criminally responsible for the acts of the other conspirators and his own failure to perform more than a few overt acts would be immaterial." Evidence of knowledge of the details of the plan or of participation of others is not required. *United States* v. *Hickey,* 360 F.2d 127 (7th Cir. 1966), certiorari denied, 385 U.S. 928.

Intent to Affect or Knowledge of Effect on Interstate Commerce

Battaglia insists that it was necessary to find that he intended to affect or had knowledge that the conspiracy would affect interstate commerce, and that there was insufficient evidence of such intent or knowledge. A similar argument was rejected in *United States* v. *Varlack,* 225 F.2d 665, 672 (2d Cir. 1955). As we recently held in *United States* v. *Pranno,* .... F.2d .... (7th Cir. 1967):

> "All that must be proved, however, is that defendants conspired to commit extortion, and that the natural effect of corrying out their threat, whether they were conscious of it or not, would affect commerce."

The District Court charged the jury that "all that is necessary is that the natural effect of the acts committed pursuant to the conspiracy was to effect, delay or obstruct [interstate] commerce," and that the requisite effect on commerce would be found if the jury believed "beyond a reasonable doubt that the defendants' activities as shown by the evidence in any way or degree obstructed, delayed or affected commerce." These instructions were proper under the Hobbs Act. Neither Battaglia nor Evans argues that the extortion would have no effect on interstate commerce. Here, one of the means to accomplish the extortion was the threat otherwise to cause Riley Management Corporation "all sorts of trouble." Many interstate deliveries were being made to its Lansing project. If Amabile's threats to destroy Riley had been carried out, this interstate commerce would necessarily have been obstructed. The Hobbs Act covers such a situation. *United States* v. *Pranno, supra.* Furthermore, the Riley company's reserves were depleted by the extortion. Since its

business depended, in part, on ability to pay for interstate shipments to the Lansing site, the jury could infer that the extortion would have an effect on interstate commerce. Under the language of this statute (see note 1, *supra*), that is a sufficient nexus with interstate commerce.

Denial of Bill of Particulars

Evans' briefs do not contest the denial of requests Nos. 2 and 3 in his motion for a bill of particulars.[6] However, Battaglia adopted these requests and argues that the District Court erroneously denied them. Specifically, Battaglia asserts that he was entitled to information about the 1962 and 1963 Palermo-Amabile threats to Riley with respect to his Northlake and Westmont, Illinois, projects. However, requests Nos. 2 and 3 provide:

> "2. State the acts or things done by the petitioner [Evans and, by adoption, Battaglia] by which he and the other named and unnamed persons, combined, confederated and agreed together to obstruct, delay and affect commerce as charged.
>
> "3. State the dates, times and places when and where the alleged acts set forth in paragraph 2 above were done or performed."

Even if the District Court had ordered the Government to answer these requests, the Palermo-Amabile threats would not have been revealed. Since Battaglia did not ask for this information below, he may not assert error in this respect. Furthermore, none of the *five* requests in the motion for a bill of particulars covered this subject matter. Therefore, the Government was not required to

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[6] The other three requests were granted and the Government answered them.

respond as to it. No abuse of discretion has been shown with respect to the partial denial of this motion. *Wong Tai* v. *United States,* 273 U.S. 77, 82.

Conspiracy Instruction

During the early portions of the trial, the District Court refused to permit the Government to have the defendants' declarations considered against all of them. Later in the trial, upon motion of the Government, the Court instructed the jury as follows:

> "Before we proceed with the taking of further testimony in this case, I have a direction and instruction to give you, to make to you.
>
> "You will recall during the course of this trial certain testimony was admitted in evidence only as to one or more of the defendants, and you were instructed at that time that such evidence was not then to be considered against any defendant to whom the evidence did not pertain.
>
> "It is now my responsibility under the law, to instruct you that such evidence is admissible against all of the defendants as evidence in connection with the alleged conspiracy charged in the indictment, whether or not each of the defendants was present when the acts or conversations or incidents testified about were done or carried on.
>
> "You may consider then such evidence as pertaining to all of the defendants."

Citing *United States* v. *Pronger,* 287 F.2d 498 (7th Cir. 1961), Battaglia complains that this instruction was a direction to the jury that a conspiracy had been proven and that each defendant was a member of that conspiracy. However, the last paragraph of this instruction referred to "the alleged conspiracy" and did not tell the jury that the Government had proved a conspiracy. A later in-

struction made it plain that the jury could not consider acts and declarations of one conspirator against the others unless the jury found the existence of a criminal conspiracy and that the acts and declarations were in furtherance of the conspiracy.

The *Pronger* case is not controlling here. The terms of the instruction in that case were dissimilar to those here, and any defect in that instruction was apparently not cured by a later instruction. Conspiracy instructions similar to those here were approved in *United States* v. *Bernard,* 287 F.2d 715, 719-20 (7th Cir. 1961), which reinforces our conclusion that the later instruction made the risk of prejudice too slight to justify reversal. *Pronger* has been confined to a situation where the erroneous instruction was in effect given as part of the charge and does not apply where, as here, trial time intervened between the ascribed comments and the final, proper charge. *United States* v. *Allegretti,* 340 F.2d 254, 256 (7th Cir. 1964, *en banc*), certiorari denied, 381 U.S. 911.

Battaglia claims that the jury was not told that it could not consider acts or declarations of a co-defendant made outside the presence of a defendant against the absent defendant unless it found that a conspiracy existed and that the acts and declarations were in its furtherance, but an examination of the transcript shows that such an instruction was given.

Admission of Pre-indictment Threats Made by Amabile and Palermo and Admission of Statements of Co-conspirator Pranno

Battaglia also asserts that the District Court erroneously admitted Riley's testimony of 1962-1963 threats by Amabile and Palermo and erroneously admitted Pranno's

statements outside the presence of the defendants. We agree with the Government that the Palermo-Amabile threats were relevant to show the reasonableness of Riley's fear when confronted with Amabile's demand to authorize the second draw. The District Court carefully instructed the jury that this testimony was limited to that purpose (Tr. 2564).

As to Pranno, the evidence concerning his January 1965 visit to Battaglia's farm, as well as other evidence previously summarized, shows that he was a co-conspirator of Battaglia and Amabile, so that La-Key's and DiVito's testimony concerning Pranno's statements outside the presence of defendants was properly received.

Accomplice Instruction

Battaglia complains that the District Court's accomplice instruction advised the jury that DiVito and La-Key were accomplices. The instruction was as follows:

> "I must tell you, ladies and gentlemen of the jury, that an accomplice is one who unites with another person in the commission of a crime voluntarily and with common intent. An accomplice does not become incompetent as a witness because of participation in the criminal act charged. On the contrary, the testimony of an accomplice alone, if believed by you, may be of sufficient weight to sustain a verdict of guilty even though not corroborated or supported by other evidence. However, you should keep in mind that such testimony is to be received with caution and weighed with great care. You should not convict any defendant upon the unsupported testimony of an accomplice unless you believe the unsupported testimony beyond all reasonable doubt."

This instruction does not say or imply that DiVito and La-Key were accomplices. The instruction obviously means

that if a person is found to be an accomplice, his testimony should be scrutinized with special care. A similar instruction has been proposed by Judge Mathes for the use of the District Courts. 20 F.R.D. 244. Such cautionary instructions were advocated in *United States* v. *Bucur,* 194 F.2d 297, 305 (7th Cir. 1952); *Wainer* v. *United States,* 82 F.2d 305, 308 (7th Cir. 1936), affirmed, 299 U.S. 92, and *Ruvel* v. *United States,* 12 F.2d 264, 265 (7th Cir. 1926). Battaglia relies on *United States* v. *Balodimas,* 177 F.2d 485, 487 (7th Cir. 1949), but there the district judge termed two named witnesses as accomplices. Here the jury had already been instructed that it was the exclusive fact finder, and there was sufficient evidence from which the jury could find that La-Key and DiVito were accomplices of the defendants. In this setting, the giving of this instruction was not erroneous.

Restriction of Cross Examination and Refusal to Admit Defense Exhibits

Battaglia assails the District Court's rulings restricting the cross examination of DiVito, La-Key and Riley; he also assails the court's refusal to receive certain defense exhibits. A study of the cross examination of these witnesses shows that the District Court allowed defense counsel considerable latitude.

Battaglia's counsel attempted to show that a tax indictment had been dismissed against DiVito in return for his agreeing to be a government witness in this case. Battaglia's counsel cross examined DiVito extensively about a "deal" to drop the income tax charge if DiVito testified for the Government in the instant case. Later the First Assistant United States Attorney in Chicago testified that the reasons for the Government's dismissal "were that Mr. DiVito's lawyer served us with that motion showing

that he had paid his taxes, attaching the check and the receipt and it was obvious that we had no case * * * .''[7] He also testified that the Assistant United States Attorney in charge of the DiVito case was satisfied that proof the tax had been paid in 1964 was a defense to that indictment. If Battaglia's counsel was still not satisfied why the DiVito indictment was dismissed, he could have also called the Assistant United States Attorney in charge of that matter.

The District Court refused to permit the defense to put into evidence the court file and docket entries relating to DiVito's tax case, but they were merely cumulative and did not reveal any "deal." Hence their exclusion was not prejudicial to Battaglia.

Battaglia endeavored to show that La-Key was responsible for the milking of the Carlson Construction and Equipment Company. The defendants were given ample opportunity to examine La-Key regarding the balances in the Carlson bank accounts. The District Court did sustain the Government's objection to certain checks. But Battaglia was not prejudiced by this ruling, for the checks were already reflected by ledger sheets that had been received, thus enabling Battaglia's counsel to argue that La-Key had looted the Carlson Company for his own personal gain. In addition, the checks were being offered in an attempt to contradict a witness on a collateral matter not relating to the $48,500 allegedly extorted. This is impermissible. *United States* v. *Masino,* 275 F.2d 129, 133 (2d Cir. 1960); *United States* v. *Sweeney,* 262 F.2d 272, 276-277 (3rd Cir.

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[7] By allowing this testimony, the trial judge acted consistently with the rule that bias or interest of a witness is not a collateral issue, and that extrinsic evidence is admissible thereon. *United States* v. *Lester,* 248 F.2d 329, 334-335 (2d Cir. 1957); 3 Wigmore on Evidence (3rd ed. 1940) §§ 948-950, 1005(b); McCormick on Evidence (1954) § 40, pp. 85-86.

1959). 3 Wigmore on Evidence (3rd Ed. 1940) § 979. Prior contradiction may be shown only on a matter material to the substantive issues of the trial. *Gordon* v. *United States,* 344 U.S. 414, 420, note 13. As noted there, a trial judge has "wide latitude in control of cross examination, especially in dealing with collateral evidence as to character." 344 U.S. at p. 423.

Next, Battaglia states that he was precluded from showing Riley's purchase price for the Lansing land. It is true that the real estate contract was not admitted by virtue of the best evidence rule. But earlier Battaglia had shown through Robert Biederman's testimony that the price was about $140,000. Since the disparity between the purchase price and the price used in loan negotiations was already in the record, no prejudice stemmed from this ruling.

Battaglia complains too that Riley's February 5, 1960, bankruptcy petition should have been admitted. Again, the District Court had broad discretion to refuse it as a collateral matter. *United States* v. *Bender,* 218 F.2d 869, 874 (7th Cir. 1955), certiorari denied, 349 U.S. 920. Riley's bankruptcy petition supposedly stated that he owned no stocks or bonds as of that date, but this record does not show that the bankruptcy statement was "obviously perjured" as Battaglia claims. No abuse of the District Court's discretion has been shown in this exclusionary ruling.

Battaglia complains that in Amabile's cross examination of Riley, Amabile was not permitted to show that Riley's October 5, 1965, statement to the Federal Bureau of Investigation did not refer to the 1962-1963 threats of Palermo and Amabile. However, Riley testified that he had advised the FBI of these threats and added: "I have only read two pages [of the October 5 statement] and I see it in there, yes, sir." If Battaglia's counsel considered the

point worth pursuing, he could have called FBI agents Dahlman and Kotsos to prove the contrary. *United States* v. *Borelli*, 336 F.2d 376, 391 (2d Cir. 1964), certiorari denied, 379 U.S. 960.

In his reply brief, Battaglia's counsel contends that the Government should have granted his request for production of DiVito's grand jury testimony.[8] No particularized need for this testimony was shown, nor was there any showing that the ends of justice required production. Therefore, production was unnecessary. See *Dennis* v. *United States*, 384 U.S. 855, 868-875.

As to Battaglia's principal cases cited to show reversible error, in *Alford* v. *United States*, 282 U.S. 687, defense counsel was not permitted to establish that a prosecution witness was in government custody and therefore might expect consideration. In this case, the defense was permitted to show that both DiVito and Riley were in government custody. In *Spaeth* v. *United States*, 232 F.2d 776 (6th Cir. 1956) and *United States* v. *Hogan*, 232 F.2d 905 (3rd Cir. 1956), the defense sought to cross examine government witnesses who stood convicted of a federal offense, in an effort to show that they expected leniency in return for their testimony. The District Court refused to allow such cross examination. In this case, Battaglia's counsel subjected DiVito to a lengthy cross examination about the reasons for the dismissal of the tax evasion indictment against him. This also serves to distinguish *United States* v. *Masino*, 275 F.2d 129 (2d Cir. 1960), where such cross-examination of government witnesses was not permitted.

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[8] Battaglia's counsel did not request the production of La-Key's and Riley's grand jury testimony.

Gordon v. *United States*, 344 U.S. 414, *United States* v. *Beekman*, 155 F.2d 580 (2d Cir. 1946), and *Meeks* v. *United States*, 163 F.2d 598 (9th Cir. 1947) deal with the exclusion of documentary evidence showing that the prosecution witnesses had been punished for violating federal law and were still subject to the jurisdiction of the court or agency which had imposed the punishment. In each case, the information contained in the documentary evidence tended to prove bias and was not otherwise present in the record. In this case, the District Judge remarked at one point: "I assume that the government is the only one who could voluntarily move for the dismissal [of the tax indictment against DiVito]." This statement, coupled with the extensive cross examination of DiVito and the examination of the First Assistant United States Attorney in Chicago, told the jury that the indictment had been dismissed on motion of the government. Defendants do not show that any other significant information was contained in the excluded documentary evidence.

Gordon, *Masino*, and *Meeks* are further distinguishable because in those cases reversal was based on the cumulative prejudicial effect of two or more errors. This case lacks at least one of the errors found in each of those cases.

We approve of the foregoing cases and of the policy of affording the defense wide latitude in showing bias. We do not view the disposition of the issues herein as inconsistent with them.

We have considered Battaglia's other points relating to cross examination, exclusion of documentary exhibits and instructions and find them to be without merit. In closing this discussion, it should be noted that various criticized evidentiary rulings of the District Court were well within

those approved in *United States* v. *Lawinski,* 195 F.2d 1 (7th Cir. 1952). Taken together, the evidentiary rulings here gave these defendants broader latitude than in *Lawinski* and do not amount to an abuse of discretion.

Evans' Character Witnesses

Evans was precluded from showing his good character through four acquaintances. Relying on *Michelson* v. *United States,* 335 U.S. 469, the District Court explained that his evidentiary rulings were based on improperly put questions and on improper foundation. As to some of the questions, this may have been an over-strict application of *Michelson.* However, no foundation was laid to show that these witnesses knew any of the people who lived in the community where Evans resided. Proof of reputation "among a limited group such as fellow employees in a particular building" has been held inadmissible. 335 U.S. at p. 481, note 17; *Williams* v. *United States,* 168 U.S. 382, 397; *Kroot* v. *United States,* 66 F.2d 449, 451 (7th Cir. 1933). Although a more liberal approach to character witness rulings has precedential basis, we adhere to Mr. Justice Jackson's precept not to "disturb rulings of trial courts" in this troublesome field except in rare instances (335 U.S. at p. 480).] (Emphasis added.)

Restriction of Evans' Testimony

Evans argues that the District Court's evidentiary rulings during his testimony denied him an opportunity to present an adequate defense.

It is true that Evans was not permitted to deny certain secrecy admonitions supposedly made about the Lansing project during Riley's June 1964 conversation with Evans, but this was because of the leading and suggestive nature of his trial counsel's questions. To rebut secrecy, Evans' counsel was permitted to elicit that the Riley company had

prepared a brochure to promote sales of the Lansing apartments, and that the Hammond *Times* published a story about the project in August 1964.

The rulings not permitting Evans to answer certain questions as to conversations with Amabile, La-Key, Di-Vito and Pranno were based on the improper form of the questions and lack of proper foundation. These rulings are supportable under rudimentary rules of evidence. Furthermore, Evans was permitted to deny that he met with those persons after his counsel rephrased his questions.

As to the bid sheets, Evans was allowed to testify that there were a signed original and a signed copy of the sewer contract bid sheets, and that the signed original was left in Riley's office, the very points his trial counsel was attempting to elicit.

Since Evans was charged with a January 1965 conspiracy, we cannot state that it was erroneous for the District Judge to consider irrelevant whether Riley held Evans in high esteem in August 1965.

Our study of Evans' testimony shows that he was given great scope in presenting his denials of any part in the conspiracy. The District Court's exclusionary ruling did not jeopardize his defense and were permissible interpretations of the law of evidence.

Evans' Counsel's Inability to Comment on Battaglia's and Amabile's Failure to Testify

Before the defendants presented their witnesses, the District Court instructed their counsel not to refer to the failure of any of the defendants to take the stand. This instruction was of course to protect the Fifth Amendment rights of the two silent defendants, Battaglia and Amabile.

The defenses of the three accused were not mutually exclusive. Also, Evans' counsel's closing argument took advantage of Evans' having taken the stand. There was no "showing that real prejudice will result from the defendant's inability to comment" (*United States* v. *Kahn*, 381 F.2d 824, 840 (7th Cir. 1967), certiorari denied, 36 US Law Week 3251), so that severance was not necessitated.

Trial Publicity

Even though defendants successfully objected to sequestering the jury, Battaglia now argues that prejudicial publicity violated his due process rights. In closing argument, his counsel recognized that the trial court repeatedly admonished the jury to ignore news coverage. There is no claim that any jurors read any of the "prejudicial" articles, thus differentiating the case from *Marshall* v. *United States*, 360 U.S. 310. In *Janko* v. *United States*, 366 U.S. 716, the second conviction was reversed because the trial court had not inquired whether the jurors had read a St. Louis Post-Dispatch article published during the trial and containing "inadmissible prejudicial information."[9] Here the jurors were twice asked whether they had seen articles about the case. None admitted having done so. *United States* v. *Accardo*, 298 F.2d 133 (7th Cir. 1962), and *United States* v. *Largo*, 346 F.2d 253, 256 (7th Cir. 1965), *certiorari denied*, 382 U.S. 904, do not hold that the District Court must always interrogate each juror singly. See *United States* v. *Jannsen*, 339 F.2d 916, 919-920 (7th Cir. 1964).

Battaglia also complains of the presence of a permanent press table inside the bar.[10] The Supreme Court has re-

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[9] See Solicitor General's Memorandum filed in the Supreme Court in the *Janko* case.

[10] Such tables have been installed in the various trial courtrooms in the Northern District of Illinois.

cently emphatically disapproved of such an installation (*Sheppard* v. *Maxwell,* 384 U.S. 333), so that the District Judges should consider reserving the bar of the court for counsel in the future (384 U.S. at p. 355). However, we do not consider the placement of this press table to constitute reversible error, for this record reveals no "frequent confusion and disruption of the trial" or "constant commotion within the bar" (384 U.S. at p. 355). In our view, the intrusion of the news media into this trial was not so great as to obviate a showing of prejudice (cf. *Estes* v. *Texas,* 381 U.S. 532 and *Sheppard* v. *Maxwell,* 384 U.S. 333). Battaglia has failed to satisfy us that he was denied a free trial because of adverse publicity.

Eavesdropping

The Government's brief reprints an August 18, 1967, letter from the Assistant Attorney General in charge of the Criminal Division of the Department of Justice to the United States Attorney in Chicago. The letter confirms the Department's pre-trial advice to the United States Attorney that there was no electronic monitoring in this case. Cf. *Hoffa* v. *United States,* 387 U.S. 231. Accordingly, it is now academic whether the District Court should have granted a hearing to determine whether electronic eavesdropping had taken place.

No prejudicial error having been shown, the two judgments are affirmed.

Nos. 16312 and 16313

SWYGERT, *Circuit Judge,* dissenting. This dissent is based on two independent grounds. First, I do not believe that the Government introduced evidence sufficient to convict Battaglia and Evans of the crime charged against

them. Second, although my views on the sufficiency of the evidence would dictate a reversal without remand, a multitude of prejudicial errors occurred which in combination, if not singly, precluded the defendants from receiving a fair trial. Consequently, on the basis of these trial errors, the case should be remanded for a new trial regardless of the insufficiency of the evidence.

I.

Sufficiency of the Evidence.

Accepting the evidence in the light most favorable to the Government, the evidence unquestionably showed that Amabile, Pranno, DiVito, Evans, and LaKey devised and executed a scheme to defraud the Riley Management Corporation by using the Carlson Construction & Equipment Company as a facade so that moneys meant for construction purposes could be diverted to those participating in the scheme. But this scheme was not the one charged in the indictment. The evidence also unquestionably showed that Amabile threatened Riley for the purpose of obtaining money. The record is barren, however, of any evidence, direct or circumstantial, to sustain the charge that Battaglia and Evans conspired with Amabile "to obstruct, delay and affect commerce" in the movement of materials for the construction of the Riley dwelling units by means of extortion.

In early 1964, the Riley Management Corporation began planning the construction of an apartment building at Lansing, Illinois. In June of that year, William Riley, president of the Riley company, requested his construction superintendent, Dave Evans, to start lining up contractors for the Lansing project, but asked Evans to keep the project "secret from Joe Shine [Amabile] and Nick Palermo." A

few days later Riley, at Amabile's request, met Amabile and Palermo at the latter's Melrose Park plumbing company office. Riley testified concerning this meeting:

> Nick Palermo asked me if I was going to build a project in Lansing, Illinois. I told Mr. Palermo that I was and Mr. Palermo asked me when he was going to get the blueprints so that he could figure the work. I told Mr. Palermo that I did not plan on giving him the work. I told Mr. Palermo that he was behind on his existing projects and with the efficiency that we were now enjoying, it was ridiculous to give him this project.
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> Joe Shine told me that I wasn't going to give it to anyone else other than them and they asked me basically what the hell I was trying to pull, ...
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> Joe Shine told me that if I didn't give them the work in Lansing, that he would stop the project in Northlake and in Westmont, Illinois. They told me that I had to use them, that if I didn't use them, that they would put me out of business. I told Nick and Joe that they were now in the process of putting me out of business, the way they were doing it. I was told not to be a smart punk.
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> Joe Shine told me I shouldn't be a wise guy. Joe Shine told me he knew how to handle wise guys and that I would be walking the streets with a candy cane.
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> • • •
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> Joe Shine told me he knew where my mother lived. He would—he told me that he knew where my kids went to school and they had a baseball bat to handle wise guys like me.

After this meeting, Riley gave Palermo the plumbing contract for the Lansing project.

In late July or early August 1964, Amabile met Mike DiVito, a sewer contractor, and Rocco Pranno in the latter's D'Or Supper Club in Stone Park, Illinois. Upon learning from Amabile about the Riley project in Lansing, DiVito asked if he could obtain some of the sewer work. Amabile said "it was possible," but that he didn't want DiVito's name on the contract. A few days later Amabile told DiVito and Pranno that if they came up with "a good clean fellow," they could get the sewer contract for the Lansing project. Shortly after this conversation, DiVito and Pranno persuaded Henry LaKey (who had been a foreman on sewer construction jobs) to work for them if they succeeded in getting the Lansing contract.

In mid-September, DiVito, Pranno, Evans, and Amabile met in the latter's apartment in Northlake, Illinois. Pranno told Amabile that he and DiVito "had a fellow to do the work for us called Hank LaKey and that he was clean." Amabile replied, "Okay, that's fine . . . [but] before I give you this job, I want $20,000 in cash."

During this period, DiVito and Pranno hired LaKey to work for them for $200 per week plus a ten per cent bonus upon completion of the job. They told LaKey they were starting a "new corporation" to be called the Carlson Construction & Equipment Corporation and they would like to have him put "on the paper as president" of the company. In contemplation of giving the sewer work to DiVito and Pranno, Evans apparently drafted a written contract to be signed by Carlson Construction. The contract that Evans originally drew up, however, was unsatisfactory to DiVito and Pranno because they had decided, after looking over the plans, that there would be insuffi-

cient proceeds from the job to pay Amabile the twenty-thousand dollars he had demanded "off the top." At this point, Amabile told Evans to figure a way to get more money out of the job. Evans rewrote the contract raising the price approximately forty to forty-five thousand dollars. After looking at the plans and specifications and seeing the high price of the job pursuant to the rewritten contract, DiVito informed Pranno that "there would be $20,000 in cash above our costs and profits." Pranno then told Amabile in the presence of DiVito and Evans that he would give him the twenty thousand dollars. Amabile replied "Okay, it's a deal." In accordance with their previous discussion, Pranno, DiVito, and LaKey formed the Carlson Construction & Equipment Company. DiVito and Pranno each received forty-five per cent of the stock and LaKey the remaining ten per cent.

Sometime in September, Riley asked Evans whether he had lined up a sewer contractor. Evans said that he had obtained an excellent contractor, Carlson Construction, operated by a man named LaKey. Evans told Riley that he "had looked into Carlson Construction's reputation, it was excellent, and . . . [he] felt quite confident that this man could do a good job." Carlson Construction was given the contract under an arrangement whereby Lawn Savings & Loan Association was to pay Carlson upon receipt of payment slips issued by the Riley company. Carlson Construction commenced the sewer work in September or October, 1964.

Early in November, Amabile instructed LaKey to get the necessary papers ready for making the first "draw." After preparing the papers, LaKey went to see Amabile at the El Morocco, a night club operated by Amabile in Northlake, Illinois. LaKey testified: "Joe Shine [Ama-

bile] asked me how much the draw was for. I told him $57,000. . . . Joe Shine said he would get a hold of Dave Evans and straighten this out." Within a day or two, LaKey and Amabile went to see Evans, who was a patient in Illinois Masonic Hospital. Before they saw Evans, Amabile told LaKey that Evans was going to receive $5,000 as his cut, not $7,500 as originally planned. At the meeting, Amabile gave Evans a "wad of bills." Evans then looked over the papers for the first draw and crossed out a number of items. After the papers had been retyped, reflecting a reduction of $10,000 in the draw, Evans approved the papers and told LaKey to take them to Riley's office. On November 12, LaKey received a check for $47,517.97 from Lawn Savings & Loan Association based on a pay-out slip approved by Sol Meltzer, Riley's comptroller. LaKey deposited $39,000 in the Carlson Construction payroll account. Of the remaining $8,517, LaKey retained $517 and gave Pranno $8,000. Three days later, at Amabile's direction, LaKey withdrew $20,000 in cash from the Carlson Construction account which he gave to Amabile.

In January 1965, Amabile told LaKey to prepare the papers for a second draw. LaKey got the papers ready and showed them to Amabile who asked how much the draw was for. LaKey replied, "$60,000." Amabile thought that this figure was too high, saying, "I don't want that kind of money taken out of the account at this time. . . . I will tell you what to draw." He also said that he would straighten it out with Evans. That same day, Evans reduced the figure to $48,000 and, after approving the papers, told LaKey to present them to Meltzer for the payment slip. When LaKey presented the papers covering the second draw for approval, Meltzer refused to authorize the request.

LaKey immediately went to see Amabile, relating in Evan's presence what had happened. At Amabile's instruction, Evans and LaKey went to see Riley the next day. Pursuant to Evans' request, however, they entered the office separately. When LaKey told Riley that he was there to get the second draw, Riley replied that Carlson Construction's bills were not being paid, and that he would authorize a payment only when LaKey had satisfied these obligations. During the conversation, LaKey told Riley that the cost of the job had gone up from $120,000 to $200,000. When Riley asked Evans to explain why the price had been increased, Evans told Riley, "There's complications set in on the job and we had to raise the price up to get the job done."

LaKey reported to Amabile that Riley had refused to authorize the second draw. Amabile replied: "You be here tomorrow morning. I'll personally go with you to the office myself. I'll get this straightened out once and for all." The next morning LaKey and Amabile arrived at Riley's office and walked in unannounced. Amabile asked Riley why he did not pay LaKey. Riley said he couldn't authorize the draw until LaKey had paid his bills. Amabile then told Riley: "I don't care nothing about that. The man's got his money coming, Bill, I want you to pay his money." At that point, Amabile and Riley went to the back of the office and commenced a conversation during which LaKey "seen a lot of arms moving by Joe Shine," who was doing most of the talking. Then Amabile walked towards LaKey, gave him a wink, laughed, and said, "You'll get your money now." Before leaving, Amabile turned to Riley and said: "Don't forget, Bill, I want you to pay this man. I want you to pay him now. You know what I mean." On the way back to the El

Morocco, LaKey asked Amabile how he was able to tell "a big man like Riley" what to do. Amabile put up his fist and said, "I got this son of a bitch right here, . . . He's afraid of me."

On the witness stand, Riley gave this version of the meeting:

> Mr. Shine told me that I had to pay this man, that this man was a friend of theirs; that I was expected to pay them; that if I didn't pay them all sorts of people would get mad.
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> I told Joe that it would be foolish for me to make this payment; that they were just pushing this company to ruination; that it just was absolutely ridiculous to pay this man and that I did not want to pay him.
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> • • •
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> Mr. Shine told me that I had no choice on this matter; that I had to pay this man; that the man wanted him paid.
>
> I told him that this was silly. I had a big loan pending with Equitable Life and this thing would it could destroy everything that we were trying to build up. I told him that, in fact I begged him not to have to pay him. He told me that I had to pay him.
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> • • •
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> He told me the man said I had to pay him and he told me if I didn't pay him there would be all sorts of trouble, and there was no sense in me making this trouble for myself so I better pay him because he was a friend of theirs.

Riley further testified that he subsequently authorized the payment because he was afraid; that he had been subjected to previous threats of physical harm to his

family and his employees and ruination of his company by Amabile and Nick Palermo. Shortly after this meeting, LaKey deposited a $48,512.48 check, received from Meltzer, in the Carlson Construction bank account. Later Amabile told LaKey to withdraw $17,000 from the account. Of this amount, Amabile gave LaKey $5,000; LaKey in turn gave Evans $1,000.

A close analysis of the evidence in this case is essential to determine whether the Government proved the crime charged. The precise charge was a conspiracy to extort money from Riley. The gist of the crime of conspiracy is an agreement between two or more people, rather than the resultant action undertaken pursuant to the agreement. Since the agreement is the gist of the crime, the agreement itself must be proved either by direct or circumstantial evidence. If circumstantial, the circumstances must be such as to warrant the jury in finding that the alleged conspirators had "some unity of purpose, some common design and undertaking, some meeting of minds in an unlawful arrangement. . . ." *Shannabarger* v. *United States*, 99 F.2d 957, 961 (8th Cir. 1938).

The conspiracy charged in this case was allegedly aimed at obstructing and delaying the interstate movement of materials and supplies required for Riley's Lansing project. That obstruction and delay was to result from the extortion of $48,500 from the Riley Management Corporation by engendering fear of bodily and economic injury in William Riley.

There is a substantial question concerning the admissibility of many statements testified to by DiVito, LaKey, and Riley, which were neither relevant to the crime charged nor binding on absent alleged coconspirators.

Assuming for the sake of argument, however, that all their testimony was relevant and admissible, I still do not believe that the evidence shows either that Evans agreed with Amabile and Pranno or that Battaglia agreed with Amabile and Pranno to commit the extortion charged in the indictment.[2]

The evidence with regard to Evans shows that the only agreement or "common design and undertaking" to which he was party was one to bilk Riley company by means of fraud and deceit out of money earmarked for the Lansing job. Consistent with a scheme to defraud, DiVito and Pranno kept in the background, Amabile expressly ordering DiVito to stay off the job. A "good clean fellow," LaKey, was recruited to act through the facade of Carlson Construction. There was constant effort among the conspirators to make sure that Riley was kept in the dark about Amabile's connection with Carlson Construction. Both draws were misrepresented to Riley as being legitimate expenditures. All these facts, as well as many others in the record, are indicia of fraud rather than extortion. Fraud is marked by misrepresentation, deception, and deceit. Extortion is direct and brutal—the very antithesis of fraud.

The Government argues that the most conclusive direct evidence showing Evans to be a "willing participant" in the conspiracy is a statement made by him to LaKey when LaKey expressed anxiety about paying his bills. Evans said: "I will talk to Joe Shine and Joe Shine will talk to the man. . . . We will see that the money is in the bank for you." (This statement was made in January

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[2] There was no proof that Evans and Battaglia had any connection with each other except through common acquaintance with Amabile, DiVito, Pranno, and LaKey.

1965, after the first draw and after Amabile had gotten his $20,000 "off the top.") Subsequent to Evan's statement, arrangements were undertaken for the second draw. Again attempts were made to deceive Riley. Evans decreased the amount of the draw prepared by LaKey. When LaKey failed to get the draw approved, Evans accompanied LaKey to Riley's office, but by prearrangement they entered the office separately. Evans told Riley on this occasion "there's complications set in on the job and we had to raise the price up to get the job done."

The foregoing facts, all involving conduct by Evans occurring after his statement relied on so heavily by the Government, suggest only deceptive conduct on his part, rather than complicity in a scheme to extort. Moreover, these same facts highlight the individual action of Amabile in resorting to extortion. When Amabile realized that the subterfuge was no longer working as it had in the past, he decided to take things in his own hands, and, unknown to the others, unmask the fraud and threaten Riley in order to get an approval of the second draw.[3]

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[3]This use of the phrase "the man," like some of its other uses, (See infra notes 5-7 and accompanying text) fails to identify the person being referred to. The majority recognizes that in this instance the phrase could refer to either Battaglia or Riley. Yet they conclude by implication that Evans was referring to Riley, stating, "The jury could properly infer that Evans knew Amabile would induce Riley—through fear—to authorize the second draw." If he was instead referring to Battaglia, the most damaging aspect of the Government's case against Evans is neutralized. Because the phrase "the man" is so indefinite and ambiguous, only speculation and surmise could supply the purport of a reference to Battaglia. But the same speculation and surmise is necessary to support the majority's rationale that the statement reflected Evans' awareness that Amabile was going to exercise extortion on Riley.

The Government also argues that the creation of Carlson Construction merely "puts a velvet glove on the iron fist with which Amabile and 'The Man' had terrorized Riley in the past." Although past extortion of Riley had been used to obtain contracts, the Government contends that in the present situation, Amabile, with Evan's cooperation, did not have to resort to force to obtain the sewer contract; instead Amabile could wait and exert his pressure to obtain the money obligated by the contract.

In fact, however, this argument reveals the clear import of the evidence in this case—that a fraudulent scheme was practiced on Riley. When Riley flatly refused to approve the second draw even though Evans had tried to persuade him in the other direction by making a bald misrepresentation, Amabile unilaterally, and perhaps spontaneously, reverted to his more accustomed role, that of an extortionist. This unilateral action on the part of Amabile cannot be transformed into a prior agreement with Evans and Battaglia to extort as the Government charged in the indictment.[4]

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[4] The record indicates that prior to the second draw Evans told LaKey that the only contracts Evans would "let out here [Lansing] are the ones Joe Shine tells me." Evans' deep involvement with Amabile is further indicated by a statement Evans made to LaKey after the second draw when he said: "I can't get out. I am too deep with Joe Shine. I know too much about the other people." The day before this conversation, LaKey had been called back from Florida to a meeting attended by Amabile and Evans. LaKey described what took place:

> I got in a conversation with Joe Shine first as soon as I got in the Club, he hollered and told me, he said, "You're not paying the bills, you're not taking care of the job. You got me in trouble with Riley. Riley's in trouble. You're

The slender reed on which the Government depends to demonstrate an agreement to extort between Amabile and Evans is not even present with respect to Battaglia. The evidence touching upon Battaglia's connection with the crime charged may be summarized as follows. Riley testified that although he had never met Battaglia, he had seen him once in early 1964 in Amabile's night club. DiVito testified that he saw Battaglia talk to Amabile in October of that year in Amabile's club. LaKey testified that in late November or early December, he was with Amabile at Battaglia's farm in Pingree Grove, Illinois, where he was introduced as "Hank LaKey running the job for them in Lansing, Illinois." While there, he heard Battaglia ask Amabile why Evans was "getting that kind of money." Amabile replied: "I made a deal with the man. The man got us the job. . . . I promised him $7,500, I'll take care of it." DiVito testified that in February or March 1965, he went with Pranno to Battaglia's farm. Amabile came a few minutes later and the three of them awaited Battaglia's arrival. According to DeVito, Pranno said in Amabile's and Battaglia's presence, "You know about this Riley deal in Lansing

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making Dave Evans lose his job. You're taking my man right out of Riley's. I don't know what is going on. You are causing nothing but trouble."

In sum, although this testimony confirms Evans' association with Amabile, it just as strongly suggests that their association was in furtherance of a scheme to defraud. At the time of the meeing testified to by LaKey, Evans was unaware that Amabile had committed extortion upon Riley to obtain the second draw. The only inference that can properly be drawn from LaKey's testimony, therefore, was that Amabile was attempting to keep the ruse going by conveying the impression to Evans that the scheme to defraud was still in operation.

where we got Hank LaKey to set up the company and do the work for us and figure $20,000 in for you?" Battaglia nodded. Pranno and Amabile then argued whether Amabile had taken LaKey away from Pranno. Battaglia interceded by saying: "Cut it out you fellows. Keep it down." DiVito further testified:

> Then Jim Pranno continued to talk and he says, "You know we had to borrow $[illegible],000 to keep this job in Lansing going and now I can't find LaKey, and you know there was $20,000 in this deal for you." Mr. Battaglia nodded, says "Yes." And then Jim Pranno continued and says, "I want to know what Joe Shine is doing to me. I want you to tell Joe Shine to get that $5,000 from LaKey so that we can pay back this loan," and Jim Pranno continued on to say that Hank LaKey was a no good s.o.b. Then Mr. Battaglia says, "Well, I don't think Hank LaKey is such a bad guy, I like him, I like to work with him," that they had other things coming up, and that they could use him again because he was clean. And after a minute or so, a pause of about a minute, then Mr. Battaglia got up out of his chair and said, "Rocky, I'll see what I can do for you."

On this record there is absent any evidence, direct or circumstantial, demonstrating that Battaglia knew that money was to be extorted from Riley or that threats were to be made to Riley by Amabile. Nor is there any evidence that Riley feared Battaglia or that Battaglia received any of the money extorted from Riley. Finally, there is no evidence that Battaglia agreed with Amabile, Pranno, or Evans to commit the crime charged against them. Yet the Government argues in its brief:

> Just as Evans acted at Amabile's direction, Amabile worked at the direction of the defendant Battaglia.

Amabile was the muscle while Battaglia was the brains, setting policy and settling disputes. His veil of secrecy was his supposed anonymity, known to a few as "The Man." When one wanted to see "The Man," one went to "The Farm."

From the foregoing evidence a jury could infer that Battaglia had a real interest in the outcome of the Lansing project, that he was participating financially in Carlson Construction's contract and that all other co-conspirators acted at his direction, directly as with Amabile, or indirectly, as with Evans.

From his own mouth Battaglia admitted knowledge of Evans' role and that Evans was being paid. Battaglia knew of La-Key's role and that Carlson Construction had the contract on the Lansing project. He knew that La-Key was being used as a front, because "he was clean." With Battaglia's knowledge of the foregoing, the jury could conclude that he was a participant in the conspiracy to place Riley in such a position that when Riley learned that Carlson Construction was in fact Amabile and Battaglia, he would authorize payment of the money in the escrow account, not because of the contract, but because he feared Amabile and "The Man."

These inferences which the Government seeks to draw, some of them non sequiturs, can rise no higher than speculation and surmise.

Much of the Government's case against Battaglia rests on identifying him as "The Man." But of the numerous instances of the use of that phrase in the record, many

refer not to Battaglia, but rather to LaKey,[5] Evans,[6] and Amabile.[7] Battaglia's financial stake in the alleged conspiracy to extort is demonstrated, according to the Government, by his two nods and saying "Yes" at the mention of "$20,000 in for you." Although Battaglia's responses to the mention of the money indicate that he was not a stranger to the Lansing venture, they are in no way probative of his complicity in a conspiracy to extort. The force of the Government's argument in this regard is largely diminished by the fact that "the Brains" [Battaglia], who was supposedly "setting policy," had to be reminded twice by Pranno that he had money coming to him.

Reliance is placed by the majority on two Second Circuit cases, *United States* v. *Andolschek,* 142 F.2d 503 (2d Cir. 1944), and *United States* v. *Falcone,* 109 F.2d 579 (2d Cir.), *aff'd,* 311 U.S. 205 (1940). *Andolschek* is cited in support of the proposition that "Battaglia had 'embarked on a criminal venture of indefinite outline'" and therefore, "had to 'take his chances' as to the methods used by the other co-conspirators." The full text of the passage, however, is more illuminating:

> It is true that a party to a conspiracy need not know the identity, or even the number, of his confederates; when he embarks upon a criminal venture

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[5] When Amabile went to see Riley concerning the second draw, Amabile said, *"The man's* got his money coming, Bill, I want you to pay his money." (Emphasis added.)

[6] When LaKey and Amabile were going to visit Evans in the hospital, LaKey said, "Joe, the deal was for $7,500 for *the man.*" (Emphasis added.)

[7] When Riley first met Amabile and Palermo in April 1962, Riley testified, "Mr. Shine who I had just met struck his face in my face and told me he was *the man* in Northlake." (Emphasis added.)

> of indefinite outline, he takes his chances as to its content and membership, so be it that they fall within the common purposes as he understands them. *Nevertheless, he must be aware of those purposes, must accept them and their implications, if he is to be charged with what others may do in execution of them.* *United States* v. *Andolschek, supra* at 507. (Emphasis added.)

And despite the majority's assertion that the "stringent test of conspiracy liability" set forth in *Falcone* was met by the Government here, that case condemned guilt by mere association.

> There are indeed instances of criminal liability of the same kind, where the law imposes punishment merely because the accused did not forbear to do that from which the wrong was likely to follow; but in prosecutions for conspiracy or abetting, his attitude towards the forbidden undertaking must be more positive. It is not enough that he does not forego a normally lawful activity, of the fruits of which he knows that others will make an unlawful use; he must in some sense promote their venture himself, make it his own, have a stake in its outcome. The distinction is especially important today when so many prosecutors seek to sweep within the drag-net of conspiracy all those who have been associated in any degree whatever with the main offenders. *United States* v. *Falcone, supra* at 581.

There can be no doubt that Amabile and Battaglia associated together, but, as the court stated in *Falcone,* mere association is insufficient evidence of guilt to support a conviction.

II.

Trial Errors

In urging reversal, Battaglia and Evans point to a number of trial errors which they claim not only unduly prejudiced them, but also prevented them from receiving a fair trial. Contrary to the majority's disposition of these contentions, I believe that such errors did occur.

Because of my views on the sufficiency of the evidence, however, I do not believe that an extended discussion of the trial errors is either necessary or appropriate. I only refer to them as they reflect upon the conduct of this trial as a whole, the most striking aspect of which was the unfavorable climate in which the proceedings were conducted. Perhaps no single error occurring outside that climate would be sufficient to require a reversal; however, their cumulative effect, as exemplified by the three errors that will be discussed in detail, leads inevitably to the conclusion that the defendants were denied a fair trial.

A. *Pre-conspiracy Threats*

The indictment charged that a conspiracy among the defendants to violate the Hobbs Act began "in or about July, 1964." Yet, William Riley, the victim of the alleged extortion, was permitted to testify over objection about threats made to him in 1962 and 1963 by defendant Amabile and Nick Palermo. These threats related to Riley's proposed building project in Northlake, Illinois and the subsequent payment of $30,000 to Amabile. Riley also testified about threats made by Amabile and Palermo in 1963 in regard to plumbing work at a Riley building project in Westmont, Illinois. Palermo on that occasion said he "would bury Hubley," Riley's construction super-

intendent, and Amabile said he "would hammer the nails on the coffin." Amabile made other threats to Riley at that time. Purportedly, this testimony was admitted for the purpose of showing the basis of Riley's fear of Amabile in January, 1965. There was ample testimony by Riley, however, of threats made by Amabile after the commencement date of the alleged conspiracy.

According to the majority, the testimony of these threats was "relevant to show the reasonableness of Riley's fear when confronted with Amabile's demand to authorize the second draw. The District Court carefully instructed the jury that this testimony was limited to that purpose." Although I agree that proof of the reasonableness of an extortion victim's fear by testimony of prior threats is generally permissible, the testimony of threats made by Palermo, who was not even charged as an unindicted co-conspirator, was irrelevant for any purpose. Moreover, I am at a loss to find the "careful instruction" referred to by the majority. Because the testimony of threats by Palermo was both irrelevant and inflammatory, the defendants were prejudiced by the district court's failure to instruct the jury to disregard that testimony. *Cf. United States* v. *Critchley*, 353 F.2d 358 (3rd Cir. 1965).

B. *The Accomplice Instruction*

The accomplice instruction was improper because the district judge, in his definition of an accomplice, for all practical purposes told the jury that the crime charged had in fact been committed. In so doing, he invaded the province of the jury. This kind of an instruction would be proper in a prosecution where the alleged accomplice admitted his participation in a conceded criminal offense. In that situation, an instruction like the one given here correctly delineates the weight to be accorded the testi-

mony of the accomplice as that testimony tends to implicate others in the crime that has been committed. In the instant case, however, the crucial question was not who the participants of a conceded crime were, but whether a conspiracy to violate the Hobbs Act, the crime charged, had been formed by the alleged conspirators.

Because the instruction did not explicitly leave open the question whether any of the witnesses were accomplices, the jury may reasonably have interpreted the instruction as a direction from the judge that the crime charged had been proved. To avoid this substantial risk of prejudice, the instruction should have been framed so that the jurors were unequivocally informed that they were the sole judges of whether any witness was in fact an accomplice. Such modification would have cured the instruction's vice — the implied assumption that the alleged conspiracy was a proven fact. See *Gordon* v. *United States,* 353 F.2d 9 (5th Cir. 1965).

C. *Evans' Character Witnesses*

Evans sought to elicit testimony of his good character through four witnesses. Conceding the somewhat inept manner in which this undertaking was attempted by Evans' counsel, the district judge's treatment of these efforts was nevertheless unduly restrictive. Throughout the course of defense counsel's efforts to question the character witnesses, Government counsel interposed objections to all questions directed to an assessment of Evans' general reputation as an honest, truthful, and law-abiding citizen. On almost every occasion, these objections were indiscriminately advanced by the simple statement, "I object." With equal regularity, the judge sustained the objections, only rarely intimating the reasons for this action.

At one point, Evans' counsel, obviously frustrated and bewildered, asked the judge to elaborate on his prior statement that "the question is improperly put." In response, the judge should have either demanded that Government counsel frame his objections in more concrete and specific terms or sustained the objections in a manner to convey to defense counsel the reason for his rulings. His failure to do so worked an unnecessary and prejudicial hardship on Evans' counsel's efforts to elicit character testimony from his witnesses.

In addition, some of the court's rulings sustaining the Government's objections were erroneous. On more than one occasion, a foundation were laid to qualify the witness, and the question posed to the witness was properly phrased. The apparent basis for the rulings sustaining the Government's objections to these particular questions was that the testimony sought related to Evans' reputation in the business community rather than his reputation in the community where he lived. The majority relied on this distinction, stating, "[N]o foundation was laid to show that these witnesses knew any of the people who lived in the community where Evans resided."

Reputation in the business community, however, is no less probative than reputation in the residential community to show the absence or presence of certain character traits in an accused. In this regard, Professor McCormick's observation is apposite:

> The reputation is usually said to be limited to that which obtained in the community where the accused lived, but this should be extended to embrace any considerable group with whom he constantly associated in his business, work, or other continued activity, and who might reasonably be thought to have a collective opinion about him. C. McCormick, Handbook of the Law of Evidence § 158, at 335 (1954).

See also *Whiting* v. *United States*, 296 F.2d 512, 517 (1st Cir. 1961). Because the crime charged against Evans had a business setting, the most probative character evidence was kept from the jury by the court's rulings. These rulings were erroneous. They were also prejudicial. For as the Supreme Court said in *Michelson* v. *United States*, 335 U.S. 469, 476 (1948), "This privilege [of presenting character testimony] is sometimes valuable to a defendant for . . . such testimony alone, . . . may be enough to raise a reasonable doubt of guilt. . . . "

III.

Instead of the traditional presumption of innocence with which criminal defendants are ordinarily clothed, the record in this case suggests that a presumption of criminality attached to the acts of these defendants because of their infamous reputations and notoriety. The defendants may have been guilty of nefarious conduct for which they deserve imprisonment, or they may have had such bad reputations as to be considered menaces to society. Such facts alone, however, cannot warrant a blinding of eyes, permitting a conviction to stand that is based on surmise rather than evidence. This kind of difficulty is present in this case because the charge on which the defendants were convicted and imprisoned, an agreement to extort money, was not sustained by the evidence. No person should be punished under our criminal laws unless he has been proved guilty of a specific offense by competent evidence in a fair trial. Due process of law demands nothing less.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

UNITED STATES COURT OF APPEALS
For The Seventh Circuit
Chicago, Illinois 60604

Tuesday, January 9, 1968

BEFORE

HON. ELMER J. SCHNACKENBERG, *Circuit Judge*
HON. LUTHER M. SWYGERT, *Circuit Judge*
HON. WALTER J. CUMMINGS, *Circuit Judge*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
vs.
No. 16312, 16313
SALVATORE BATTAGLIA and
DAVE EVANS,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgments of the said District Court in this cause appealed from be, and the same are hereby, AFFIRMED, in accordance with the opinion of this Court filed this day.

APPENDIX C

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Wednesday, April 17, 1968

BEFORE

HON. JOHN S. HASTINGS, *Chief Judge*
HON. ELMER J. SCHNACKENBERG, *Circuit Judge*
HON. LATHAM CASTLE, *Circuit Judge*
HON. ROGER J. KILEY, *Circuit Judge*
HON. LUTHER M. SWYGERT, *Circuit Judge*
HON. THOMAS E. FAIRCHILD, *Circuit Judge*
HON. WALTER M. CUMMINGS, *Circuit Judge*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
vs.
No. 16313
DALE EVANS,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

IT IS ORDERED by the Court *en banc* that the petition for a rehearing *en banc* of this cause be, and the same is hereby, DENIED.

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MAY 24 1968
JOHN F. DAVIS, CLERK

No. 124

In the Supreme Court of the United States

OCTOBER TERM, 1968

JOSEPH AIUPPA,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No.

JOSEPH AIUPPA,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner, Joseph Aiuppa, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit affirming a judgment of conviction entered by the United States District Court for the District of Kansas.

OPINIONS BELOW

The opinion of the Court of Appeals is not yet reported and is printed in the Appendix to this petition. (Appendix A, *infra* pp. 1-12). Also printed in the Appendix, as

relating to an earlier stage of the case is the opinion of the Court of Appeals for the Tenth Circuit in *Aiuppa* v. *United States,* 338 F.2d 146 (Appendix C, *infra* pp. 13-17).

JURISDICTION

The judgment of the Court of Appeals was entered on April 25, 1968. (Appendix C. *infra* p. 12). The jurisdiction of this Court was invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. When physical evidence and all leads therefrom obtained by an unlawful search and seizure are ordered suppressed pursuant to the mandate from a prior appeal, may the government on the second trial introduce evidence describing such suppressed physical evidence, and use leads obtained therefrom, without establishing lack of taint?

2. May a conviction, even for a petty offense, be supported by assumption and affirmed, absent other proof of the violation?

3. In a criminal trial which had been transferred to a Judicial Division other than that in which the information was filed, because of prejudicial publicity, prevalent throughout the State, and where ten prospective jurors had been excused for opinion or bias obtained from publicity, may a District Judge properly refuse to interrogate the trial jury concerning exposure to admittedly prejudicial accounts appearing in newspapers of general circulation in the State of Kansas in both days of the trial, and brought to the attention of the Court prior to the jury's retirement and deliberation?

4. In a criminal trial which had been transferred from another District in the same State because of publicity, and ten prospective jurors had been excused for opinion or bias arising from publicity, may the jurors be allowed to separate during deliberations with likely exposure to admittedly prejudicial publicity?

5. In light of *Griffin* v. *California,* 380 U.S. 609, may the Court, over specific objections, instruct the jury that a defendant cannot be "compelled" to testify, and no presumption of guilt and no inference of any kind may be drawn, from the "failure" of a defendant to testify?

STATEMENT OF THE CASE

The petitioner was convicted in a trial which lasted two days, by jury, of a third amended information containing two Counts, Count 1 charging the petitioner with unlawful possession of approximately 500 mourning doves, all but 48 of which were in excess of the legal limit in violation of Section 703, T. 16, U.S.C.; Count 2 charged the petitioner, Joseph Aiuppa, without being permitted by regulation, with the transportation of the same mourning doves, also in violation of the same statute.

This was the second trial of the defendant, the first Judgment of the District Court of Kansas, after a trial without a jury, having been reversed for the error of failing to suppress evidence.

After the remand from the first appeal (the opinion in which appears in the appendix hereto as Appendix "C" at appendix pages 13 through 17), the United States Attorney filed a third amended information on February 1, 1965. The original arrest of the petitioner occurred on October 1, 1962. After post trial motions by the de-

fendant were denied in this second trial at Fort Scott, Kansas, the petitioner was sentenced to custody of the Attorney General for a period of three months on October 1, and was fined $500.00 on each of Counts 1 and 2, making a total of 3 months' imprisonment and $1,000 in fines, plus the costs of prosecution.

After the reversal of the first trial, where the petitioner received a similar sentence, Chief Judge Stanley of the District of Kansas entered an order providing as follows:

> "Now on the 2nd day of September, 1965, the defendant's motion to suppress evidence comes on for argument. After hearing arguments of counsel . . . for the defendant and being well advised in the premises, the court finds that all conversations, records, identifications, researches and evidentiary leads emanating from said search and seizure complained of be suppressed." (App. 72)[1]

On June 20, 1966, this cause came on for re-trial before the Hon. George Templar and a jury, at Fort Scott, Kansas. The first trial was at Kansas City, Kansas, and the motion of the petitioner for removal to another Division was granted because of the prejudicial publicity which attended the first trial, both before and during the trial.

In voir dire conducted by Judge Templar, ten of the prospective jurors were excused for cause because they said that they had read of the case in newspapers or had heard about it on radio and television, or had discussed it, and had a bias or an opinion concerning the guilt of the

[1] References to "App." are to the certified Appendix prepared for the Court below and filed with this Petition.

petitioner. These prospective jurors were excused for cause, since the petitioner had only three peremptory challenges under the Federal Rules of Criminal Procedure. (App. 95-141)

After the selection of the jury and prior to the commencement of the reception of evidence, an attorney named Menghinie advised the court and the United States Attorney that he represented a number of witnesses who had been subpoenaed by the Government who felt that under the circumstances that they should refuse to testify as they might incriminate themselves. He further told the court that he represented a Mr. Blunk who at the time of the occurrence of the transaction, was a ward of the court and was judged incompetent and that he had a statement from the doctor stating that at the present time Mr. Blunk was not fit to testify. (App. 146-147)

The first witness for the Government, Andrew Williams (App. 151-167), was permitted to testify over the objection of the petitioner (App. 151-2), that his testimony was the result of a lead emanating from a search which had been held to be illegal. On the hearing on the motion to suppress, Alfred Robinson, a United States Game management agent, testified that it was not until after the car was searched that he knew it contained mourning doves and it was only after he obtained this information that he interviewed Williams. (App. 27)

Andrew Williams testified (App. 151-169) that from September 15 to October 1, 1962, he cleaned doves for many people and stored them at Frontenac, Kansas in the ice box at a Dairy Queen. He was paid by a man named Harold MacMurry for cleaning doves and he imagined that Mr. Aiuppa had paid him because he was keeping his dog. He kept Mr. Aiuppa's dog for four months and he

paid him $150.00, on October 1, 1962. On approximately October 1, 1962 at the request of the petitioner, Williams obtained some dry ice at the ice plant at Pittsburg, Kansas and took it to the Dairy Queen in Frontenac where he broke it into small pieces, and put the ice on top of coolers. He further testified that he put dry ice on top of the cartons and that there were packages in the cartons but that he had never seen the packages opened. He testified that he placed the mourning doves in a sack or plastic bag. He further testified that he cleaned somewhere between 900 and 1400 doves. He also testified that he prepared a plastic bag full of giblets for the petitioner and that after placing the bag in the freezer at the Dairy Queen it was broken and Mr. Aiuppa requested another bag. He further testified that there were cartons that were filled with plastic bags and he placed ice on top of these cartons and he placed one of the cartons in the automobile of the petitioner, but he did not know how many birds were in the carton (App. 161) and he could only assume that other cartons were placed in the Cadillac. The witness did not know how many birds were in the containers but he assumed that there were four or five hundred (App. 164-165).

Mr. Williams testified that Agent Robinson and another agent first contacted him about this case the day after Mr. Aiuppa had left for Chicago and that he had never discussed this matter with them or any one else representing the Government prior to that day. (App. 166-167). He further stated that he cleaned and placed somewhere between 900 and 1400 birds in the ice box at the Dairy Queen, but he did not know how many remained the morning he went over to the Dairy Queen when Mr. Aiuppa was leaving for Chicago but that there were many people who had access to the birds including a Mr. MacMurry

who had removed some birds from the cooler. He did not count any of the birds which he placed in the car of the petitioner and he did not know how many there were remaining in the freezer after he had driven away. He also testified that doves were hunted by large number of persons and frequently they were cleaned and stored and were used for "game feeds" at which many people would attend. (App. 168-169).

Also, during the questioning of this witness by the attorney for the Government, after the witness had been unable to give definite answers to questions by the attorney for the Government, the following occurred:

> Q. Who told you to have a faulty memory?
>
> A. Nobody told me to have a faulty memory.
>
> Mr. Walsh: Object, and move to strike it. I ask the jury be instructed not—to disregard that question and answer.
>
> The Court: Sustained, the jury will disregard it.

On the first trial, the prosecutor had the benefit of Williams' testimony, but also that of the agents who conducted the illegal search and seizure, and the evidence of an ornithologist who established the subject birds as mourning doves, subject to the migratory bird treaties and Acts.

In the second trial, the only evidence offered on these subjects was that of Andrew Williams, because of course, all of the other evidence was suppressed.

Williams testified to his being taken to the United States Commissioner and there charged with a violation of the Migratory Bird Act, and receiving a fine of $50.00 and giving statements to the Game Wardens—all after Aiuppa's arrest and the illegal search and seizure had confirmed the Warden's suspicion that Aiuppa possessed and transported mourning doves.

During the trial of the case, Mr. Blunk was called to testify (App. 175) over the objection of the petitioner (App. 174). He refused to answer questions on the grounds that he feared his testimony might tend to incriminate him.

Hugo Farabi also was called to testify (App. 181-2), and he exercised his privilege against self-incrimination. He further stated that he had advised the prosecutor, through his counsel, prior to being called to testify, that he intended to claim his privilege (App. 181-2).

At the conclusion of the Government's case, the defendant moved for a mistrial based on the ground that he was unduly prejudiced by the prosecutor's action in calling Mr. Farabi and Mr. Blunk to the witness stand when he knew and had been informed by their counsel, that they intended to take the privilege granted to them under the Fifth Amendment of the Constitution of the United States (App. 197).

Petitioner further moved for judgment of acquittal at the end of the Government's evidence (App. 197); prior to ruling on the motion for judgment of acquittal, the court stated that it was having difficulty with reconciling the number of doves that were in the possession of Mr. Aiuppa from the evidence, and the court stated further that it seemed somewhat speculative from the evidence as to the number of doves in his possession, but overruled the motion (App. 200-202). The petitioner then rested (App. 201-202). During the conference on instructions, the petitioner objected to the giving of court's instruction 16 (App. 88-210) on the basis that the manner in which the instruction was phrased that "the law does not compel a defendant in a criminal case to take the witness stand and testify" was prejudicial comment on the failure of the petitioner to testify and also implied that although he could not be

compelled to testify, his testimony would be desirable. The petitioner further objected to giving any instruction on the failure of the petitioner to testify in his own behalf (App. 210-211).

The petitioner then moved for a mistrial based upon two newspaper articles, petitioner's Exhibit "A" and "B" (App. 280-283). The petitioner further moved in lieu of granting a mistrial on the basis of the publicity that the court query the jurors individually and separately out of the presence of the others concerning what they know about these articles, and what they know about other specific articles, and whether they had ever heard Mr. Aiuppa described as a gangland or syndicate hoodlum (App. 215-216). The court relied upon a presumption that the jurors would do their duty and refused to conduct any voir dire examination (App. 216). The case was argued and submitted to the jury, and the jurors were allowed to separate during their deliberations. When they separated, no admonition of any kind was given to them concerning exposure to publicity. They were told only that they were not to talk about the case (App. 242-243). The jury returned a verdict of guilty (App. 88). A timely motion for acquittal notwithstanding the verdict or in the alternative for a new trial was filed on July 7, 1966 (App. 89). This motion was denied on August 19, 1966 (App. 91). On August 19, 1966, the petitioner was sentenced to the custody of the Attorney General for a period of three months on Count One and was fined $500.00 on each of Counts One and Two for a total fine of $1,000.00, and further assessed the cost of prosecution. A timely notice of appeal was filed (App. 93). On appeal the Court below affirmed the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

1. The decision of the United States Court of Appeals for the Tenth Circuit is in conflict with the decision of this Court in *Silverthorne Lumber* v. *United States*, 251 U.S. 385 in that it permits the Government to use evidence obtained from an illegal search and seizure without any showing of lack of taint.

The defendant's original conviction in this cause was reversed by the United States Court of Appeals for the Tenth Circuit on the grounds that agents had illegally searched the automobile of the defendant and found therein the mourning doves which were the object of this prosecution. Pursuant to the mandate of the United States Court of Appeals, Chief Judge Stanley of the District of Kansas entered an order suppressing all evidence obtained in that illegal search and further suppressed all conversations, records, identifications, researches and evidentiary leads emanating from the search.

When the Government's witness, Andrew Williams, was called to testify, defendant objected to his testimony without a showing by the Government that his testimony did not result from a lead emanating by the illegal search and seizure. The trial court overruled this motion solely upon the representation of the Government that no leads were obtained concerning this witness from that search (App. 152).

The Court of Appeals held this procedure to be proper, relying on testimony given in the motion to suppress, prior to the first trial, that prior to the illegal search complained of, agents had received "information from an informer" that the petitioner had been hunting in the area and had killed the doves and that Williams was cleaning the doves,

packaging them and placing them in cold storage. The informer's identity was refused, although repeatedly requested. This reasoning, however, ignores the testimony by the United States Game Management agent who interviewed Williams that it was not until after the automobile of the petitioner had been illegally searched that he knew it contained mourning doves or how many and that it was only after he had obtained this information from the illegal search that he interviewed the witness (App. 27). Thus, this evidence was arrived at by the exploitation of the illegal search and seizure and this testimony should have been suppressed. *Wong Sun* v. *United States,* 371 U.S. 471, 488.

We also submit that the reliance by the Court of Appeals on the testimony of the Game Management agents at the motion to suppress is misplaced. The testimony of the Game Management agents was that they had received the information from persons they considered to be reliable. There was no testimony that these "informers" had ever given reliable information in the past, nor was there any testimony of personal observation which tended to corroborate the information. This Court has recognized that an arrest may be made, without warrant, on information supplied to the arresting officer by a confidential informant who has given reliable information in the past. *Draper* v. *United States,* 358 U.S. 307, and has held that a warrant may issue upon hearsay information if there is "corroboration through other sources of information." *Jones* v. *United States,* 362 U.S. 257, 271. However, in this case, there had not been information in the past, nor was there any other substantial basis for crediting the hearsay. Therefore, this hearsay could not have supported the issue of probable cause for arrest without a warrant. Reliance upon such information, we submit, cannot satisfy the "heavy burden,"

Miranda v. *Arizona,* 384 U.S. 436, 475, which the Government must meet in order to establish that the constitutional right of the petitioner, to be free from unreasonable searches and seizures, did not continue to be violated. It certainly cannot be said that this evidence was free from taint beyond a reasonable doubt. *Chapman* v. *California,* 386 U.S. 18. We therefore submit that this Court should grant a Writ of Certiorari to review this judgment in order to set the standards and burden of proof which the Government must meet in order to clear itself of taint from an illegal search and seizure.

2. This court in *Thompson* v. *City of Louisville,* 362 U.S. 199, *Shuttlesworth* v. *City of Birmingham,* 382 U.S. 87 and *Brown* v. *Louisiana,* 383 U.S. 131, has held that it is a violation of due process to convict and punish a man without evidence of his guilt. This case presents the question whether the "assumption" of facts necessary to convict similarly violates the due process clause of the Fifth Amendment. The petitioner stands convicted of possession of mourning doves in excess of the statutory limit (48) and of transportation of those same doves. The only evidence concerning possession and transportation came from the witness Andrew Williams. Williams could not testify as to how many doves were placed in the trunk of defendant's automobile. He did testify that he placed approximately ten doves in plastic bags and that he then filled freezers with the plastic bags. There was absolutely no evidence whatsoever that the total number of doves in the defendant's possession exceeded forty-eight. However, the Court of Appeals sustained the conviction on this count by stating:

> We think it can safely be assumed that each "freezer" held more than one plastic bag of doves. (App. 4)

Insofar as the Government's proof relating to transportation is concerned, it is similarly deficient. Williams testified that he directed the petitioner as to the best way to travel to Missouri and that he "presumed" it was the petitioner who honked at him while he was buying gas a little later.

We respectfully submit that the principles of the due process clause of the Fourteenth Amendment, applicable to the States, enunciated by this court in *Thompson, Shuttlesworth* and *Brown* should be made equally applicable to the Federal Government under the due process clause of the Fifth Amendment.

3. The decision of the Court below relating to the duty of the District Judge to conduct an inquiry of the jurors when newspaper articles, which are admittedly prejudicial, appear is in conflict with the decisions of this Court in *Janko* v. *United States,* 366 U.S. 716, *Sheppard* v. *Maxwell,* 384 U.S. 333, the Seventh Circuit in *United States* v. *Accardo,* 298 F.2d 133 and *United States* v. *Largo,* 346 F.2d 253; the District of Columbia in *Coppedge* v. *United States,* 272 F.2d 504, the Fifth Circuit in *Henslee* v. *United States,* 246 F.2d 190 and the Sixth Circuit in *Marson* v. *United States,* 203 F.2d 904. The trial of this case, which had been transferred to Fort Scott, Kansas because of prejudicial publicity consumed a period of two days. In the selection of the jury, ten prospective veniremen were excused because they had formed opinions based upon their exposure to publicity. At the conclusion of the evidence, counsel for petitioner brought to the attention of the court two newspaper articles which had appeared in the Kansas City newspapers, which were purchased by counsel for the petitioner, on the streets of Fort Scott, Kansas. These articles (App. 280-283) referred to the petitioner as a "gangland

figure'' and related that his prior conviction for this offense had been reversed by the United States Court of Appeals for the Tenth Circuit because of an illegal search and seizure. Defendant's Exhibit ''A'' also reported that the United States Attorney indicated that he had in his possession evidence sufficient to convict. The second article (Exhibit ''B'') again referred to the petitioner as ''gangland figure'' and again related that the petitioner had been convicted on these charges in a prior trial but the conviction had been reversed because of an illegal search and seizure. This article also erroneously reported that the District Judge had asked the witness Williams, ''Who told you to have a faulty memory?''

When these articles were called to the attention of the District Judge (App. 214-217), there was no contention made that these newspapers were not newspapers of general circulation in the State of Kansas, nor was there any contention made by the Government, and we do not anticipate any such contention here, that these newspapers were not available in Fort Scott, Kansas. The Court, however, refused to interrogate the jurors concerning their exposure to these articles as requested by the petitioner and based his refusal on the reasoning that to so interrogate at this time would be prejudicial to both the Government and the defendant (App. 216).

The Court of Appeals made an affirmative finding that the articles were in fact prejudicial (Appendix A, *infra*, p. 11) but found no error in the failure of the District Court to conduct an inquiry of the jurors to determine their exposure to these articles.

We submit that this decision is in direct conflict with the decision of this Court in *Janko* v. *United States*, 366 U.S. 716 where this Court, based upon a confession of error by

the Solicitor General, reversed a conviction on facts strikingly similar to the case of the petitioner. The trial of *Janko* lasted two days. During that two-day period, prejudicial articles appeared in the press describing Janko as a "former convict" and stating that he had been convicted of the same offense but was granted a new trial. The District Judge did not conduct an inquiry of the jurors. In confessing that this procedure was in error, the Solicitor General stated:

> "The nature of the newspaper article in question, especially in its reference to the outcome of the prior trial and to petitioner as a 'former convict' and a 'former employee of East Side rackets boss Frank (Buster) Wortman'—a recipient of considerable adverse pulicity in the St. Louis press—was such as to raise substantial doubt as to whether if it did in fact reach the jurors the inadmissible prejudicial information could be wiped out of a juror's mind. *Marshall* v. *United States,* 360 U.S. 310.
>
> "In the light of the character of the extraneous information contained in the article, we think that, before the jury was finally discharged, the trial court should have assured itself as to whether the jurors had in fact read the article"

The procedure suggested by the Solicitor General is followed in the Seventh Circuit, *United States* v. *Accardo,* 298 F.2d 133 and *United States* v. *Largo,* 346 F.2d 253; the District of Columbia, *Coppedge* v. *United States,* 272 F.2d 504, the Fifth Circuit, *Henslee* v. *United States,* 246 F.2d 190 and the Sixth Circuit, *Marson* v. *United States,* 203 F.2d 904.

Therefore, this Court should issue its Writ of Certiorari to resolve this important question in the administration of criminal justice relating to the duty of District Judges to ascertain the effect of prejudicial publicity upon jurors.

4. The decision of the Tenth Circuit relating to the separation of jurors during deliberations is in direct conflict with the decision of the Seventh Circuit in *United States* v. *D'Antonio,* 342 F.2d 667 (7th Cir. 1965) and *United States* v. *Panczko,* 353 F.2d 676 (7th Cir. 1966).

In *D'Antonio,* with no showing of actual prejudice, the Seventh Circuit held:

> At no time is it more essential that the jury should be immunized from outside influences than when it is engaged in deliberating upon what its verdict is to be. During that critical period, when the jurors are engaged in resolving vital issues between the government and the defendant, the judge certainly should not relax the traditional safeguards against outside intrusion.

In *Panczko,* the Seventh Circuit reiterated the decision in *D'Antonio,* even though the jury had been instructed not to read anything or listen to anything about the case or discuss it with anyone. 353 F.2d 676, 677, 678.

In this case, although direct reliance was placed on *D'Antonio,* and *Panczko* by the petitioner, the Tenth Circuit, without mentioning these decisions, refused to find prejudice in the separation. In so doing the Court stated that the trial court properly admonished the jury in regard to their conduct during separation. (Appendix A, *infra,* p. 11) An examination of the record however fails to disclose the admonition. The Court only told the jurors not to discuss the case during the luncheon recess. Nothing was said about exposure to publicity. (App. 242-243).

Because of the conflict within the circuits concerning the propriety of separation of jurors during deliberation in criminal cases, this Court should issue its Writ of Certiorari.

5. This court in *Griffin* v. *California,* 380 U.S. 609, held that it was a violation of a defendant's privilege against self-incrimination to allow comment by the Court and prosecutor concerning the failure of a defendant to testify, and in *Chapman* v. *California,* 386 U.S. 18, this Court held that such comment was reversible error unless it was established beyond a reasonable doubt that such a violation of the Fifth Amendment was harmless error. In the case at bar the petitioner did not elect to become a witness in his own behalf. Over the objection of the defendant, the Court instructed the jury that the petitioner could not be "compelled" to testify. Although this instruction does not allow the failure to elect to testify to be considered as affirmative evidence of guilt, by its very terms it implies that an innocent defendant would testify and as such is violative of the principles enunciated in *Griffin.* Further, the petitioner objected to the giving of any instruction relating to his failure to elect to become a witness in his own behalf. We submit that this Court should issue its Writ of Certiorari to settle the question whether an instruction relating that a defendant cannot be "compelled" to testify and "failure" to testify constitutes a prejudicial comment upon the failure of a defendant to testify when he expressly objects to any charge on the subject whatsoever, and thereby impinges upon the defendant's Fifth Amendment rights.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

MARCH TERM 1968

JOSEPH AIUPPA,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. 9243
	)	
UNITED STATES OF AMERICA,	)	
	)	
Appellee.	)	

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

Maurice J. Walsh (John Powers Crowley with him on brief) for Appellant.

Newell A. George for Appellee.

Before MURRAH, Chief Judge, LEWIS, Circuit Judge, and CHRISTENSEN, District Judge.

MURRAH, Chief Judge —

On first appeal from a jury-waived trial and conviction for unlawful possession and transportation of migratory

birds, 16 U.S.C. §703, we remanded this case for a new trial with directions to suppress, as evidence, contraband [560 frozen mourning doves] seized as the fruits of an unlawful search. Aiuppa v. United States, 338 F.2d 146. On this appeal from a jury conviction and sentence on the same counts Aiuppa asserts numerous other grounds for reversal. After careful consideration of each point raised, we affirm the judgment.

Aiuppa first contends here that the Government should have been required to elect between Counts I and II of the Information. The argument is to the effect that since Count I charged possession of the birds and Count II charged transportation, and since it is necessary to have possession in order to transport, the two counts are necessarily merged. Little need be said concerning this contention, for it is conceded, as indeed it must be, that where the same act or transaction constitutes a violation of two distinct statutory provisions, the traditional test of identity of offenses is whether the same evidence is required to sustain them. See Rawls v. United States, 162 F.2d 798; Beacham v. United States, 218 F.2d 528, and cases cited; Robinson v. United States, 366 F.2d 575. We think the charges here were sufficiently separate and distinct. Under Count I proof was required to show that Aiuppa had in his possession migratory birds in excess of the number allowed by statute (24 per person). Under Count II it was necessary to prove that he did some act in furtherance of the transportation of such birds. Moreover, no where in the record before us can we find where the appellant raised such an objection at trial.

Objection is next raised to the testimony of the Government's witness, Andrew Williams, on the grounds that such testimony was the result of an investigative lead obtained

from the illegal search. It is argued that Williams was not interviewed by the Government until after the illegal search and that the Government failed to sustain the burden of establishing that the lead did not emanate from that search. Suffice it to say that the record clearly reflects that prior to the illegal search the Government received information from an informer to the effect that Aiuppa had been hunting in the Frontenac-Pittsburg, Kansas, area with well-known people; that "they had killed an enormous amount of doves" and that Williams was cleaning the doves, packaging them and placing them in cold storage. Since knowledge of these facts was gained prior to and independently from the illegal search, they may be proved like any other facts. See Wong Sun v. United States, 371 U.S. 471; Silverthorne v. United States, 251 U.S. 385. Such independently gained information does not become tainted merely because the same information is subsequently discovered during an illegal search. See Burke v. United States, 328 F.2d 399.

It is also urged that even considering the testimony of Andrew Williams, the evidence was insufficient to prove that Aiuppa either possessed or transported mourning doves in excess of the statutory limit [24 per person or a total of 48 for Aiuppa and his wife]. The argument is that there was no direct testimony that the birds in question were mourning doves protected under the provisions of §703 and that the only testimony as to how many birds were placed in Aiuppa's automobile consisted solely of assumptions and guesses.

Many times we have said that in determining the sufficiency of the evidence to support a jury verdict, we are constrained to view the evidence in the light most favorable to the Government and to examine such evidence only to

determine whether the jury was justified in finding beyond a reasonable doubt that the defendant was guilty of the offense charged. See Elbel v. United States, 364 F.2d 127; VanNattan v. United States, 357 F.2d 161; Reed v. United States, 377 F.2d 891. And, it is equally important to bear in mind that in so viewing the evidence it is not our function to determine the weight of the evidence or assess the credibility of the witnesses. See Lucas v. United States, 355 F.2d 245, and cases cited. Applying these rules, we cannot say the evidence here did not support the verdict. Andrew Williams testified that during approximately a two-week period he cleaned between nine and fourteen hundred mourning or turtle doves and placed them in plastic bags for various hunters, including Aiuppa, in the Frontenac-Pittsburg, Kansas, area; that these doves were then placed in cold storage in the Dairy Land Freezer in Frontenac; that he placed approximately ten doves in each plastic bag and then filled "ordinary freezers" with the plastic bags. Without giving linear dimensions Andrews indicated by hand motions to the jury the approximate size of the freezers or cartons in which the bags of doves were placed.[1] He also testified that he placed one of these cartons in the rear of Aiuppa's car and thereafter saw where three others had been placed in the rear of the car; that Mr. and Mrs. Aiuppa were sitting in the car and that he (Williams) directed them as to the best way to "get out of town to Missouri". By way of identifying the contraband game, Mrs. Williams testified that she assisted her husband on at least one occasion in cleaning some mourning or turtle doves. Ronald Tims also testified that he assisted Mr. Williams in cleaning turtle doves. From all of this evidence we think the jury

[1] We think it can safely be assumed that each "freezer" held more than one plastic bag of ten doves.

was justified in finding that Aiuppa possessed and transported more than 48 mourning doves in violation of §703.

Complaint is next made of the prosecutor's commenting on the memory of witness Williams and calling as witnesses two other persons who had previously informed him they would refuse to testify. During the trial, while Government witness Williams was testifying on direct examination and having difficulty recalling specific details, the prosecutor asked him, "Who told you to have a faulty memory?" Aiuppa's counsel immediately objected and upon motion the Court ordered the testimony stricken and directed the jury to disregard it.

We agree with appellant that the statement by the prosecutor was unnecessary and improper. But, every slight excess of the prosecutor does not require that a verdict be overturned and a new trial ordered. United States v. Borda, 285 F.2d 405. And, such an error can generally be cured, as indeed it was here, without harmful effect upon a defendant by the trial court's striking the testimony of comment and admonishing the jury to disregard it. Lawrence v. United States, 357 F.2d 434; Drew v. Lawrimore, 380 F.2d 477, and cases cited; and see Singer v. United States, 380 U.S. 24, 38.

As to the allegation that the Government prejudicially called two witnesses who had advised the court they would invoke the protection of the Fifth Amendment and refuse to testify, both sides rely upon United States v. Compton, (CA 6), 365 F.2d 1, 5, wherein the court stated:

> "Government counsel need not refrain from calling a witness whose attorney appears in court and advises court and counsel that the witness will claim his privilege and will not testify. However, to call such a witness, counsel must have an honest belief that the wit-

> ness has information which is pertinent to the issues in the case and which is admissible under applicable rules of evidence, if no privilege were claimed. It is an unfair trial tactic if it appears that counsel calls such a witness merely to get him to claim his privilege before the jury to a series of questions not pertinent to the issues on trial or not admissible under applicable rules of evidence."

It is argued that there was no showing by the Government that either of these witnesses had information pertinent to the issues in the case, and that the only purpose for calling them was to get them to claim privilege before the jury, leaving the inference they were hiding something.

The record indicates that a Kansas attorney appeared during the trial and informed the court that he represented "a number of witnesses who feel that they should, under the circumstances, refuse to testify as they might incriminate themselves." No where can we find where the "number of clients" were identified by name or that these two witnesses were identified as being among those represented by the attorney. Moreover, both of these witnesses had testified in the first trial and in this trial were asked only a few pertinent questions, such as whether they had hunted with the accused. Immediately upon claiming the privilege of the Fifth Amendment, each was excused from further testifying. We cannot say that the Government did not honestly believe the witnesses had pertinent information nor that under the circumstances it was prejudicial to attempt to elicit such information from them.

The next allegation of error is directed at the court's permitting two government agents each to testify to the effect that he is employed by the Department of Interior and is custodian of the records in his respective region;

that he had searched the records in his region and could find no record of an application or permit for Aiuppa to possess more than the statutory limit of mourning doves. The argument is to the effect that the best evidence would have been the records themselves and that failure of the witnesses to produce the records from which they made their search deprived Aiuppa of his constitutional right to cross-examine witnesses against him. Reliance is placed upon United States v. Rohalla (CA7), 369 F.2d 220, wherein the court held it was prejudicial error to permit an F.B.I. agent to testify that he had examined a license registration book published by the Secretary of State's office and had determined that a certain license number was issued to the defendant, Rohalla. The court in that case reasoned that "There was no way that defense counsel could by cross-examination of agent Williams effectively challenge the authenticity or accuracy of a book that was not produced in court." Id. 224. But, we think that case is easily distinguished from ours. In Rohalla the Government was attempting to prove an entry in an official book, but the agent testifying did not purport to be the official custodian of the records he had examined. And, the court was careful to note that "The book which should have been produced in open court was available to the government and was at that time in the same building where the trial was being conducted." In our case the Government was attempting to prove the absence of an entry in an official set of records by the testimony of the official custodians. Rule 27 F.R.Cr.P. and Rule 44(b) F.R.C.P. specifically provide that "A written statement that after diligent search no record or entry of a specified tenor is found to exist in the records designated by the statement * * * is admissible as evidence that the records contain no such record or entry." And, Rule 44(c) provides that "This rule does not prevent the proof of * * * lack of entry therein by any

other method authorized by law." Thus, "to establish the fact that there is no record as to a particular matter or thing, parol evidence may be given." Jackson v. United States, 250 F.2d 897, and authorities cited. We can, therefore, see no error in allowing the Government to negate the issuance of a permit to Aiuppa without producing the records. And, see also dissent in United States v. Rohalla, supra.

Aiuppa next urges that it was prejudicial error for the trial court to instruct the jury that

> "The law does not compel a defendant in a criminal case to take the witness stand and testify, and no presumption of guilt may be raised, and no inference of any kind may be drawn, from the failure of a *defenant* to testify.
>
> "The legal theory for this rule is immaterial so far as you are concerned, but the important and vital point for you, as jurors, is that a defendant has the unqualified right not to take the stand and you may not in any manner draw any inference against the defendant because he did not take the stand."

It is argued that the language of the instruction amounts to a prejudicial comment on the failure of a defendant to take the stand, prohibited in Griffin v. California, 380 U.S. 609.[2] But, we cannot agree. We know, of course, that such an instruction must be given if requested, i.e. see United States v. Schabert, 362 F.2d 369, and cases cited.

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[2] In Griffin the court was concerned with the California "Comment Statute" which provided that a defendant's failure "to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel, and may be considered by the court or the jury." The Supreme Court held that this violated the Fifth Amendment prohibition against self-incrimination.

While it may be the better practice not to charge on this subject unless specifically requested by a non-testifying defendant, it is not reversible error to do so. Id. 372. When couched in such careful terms as used here, we do not think the charge can be said to be more than "a faithful compliance with the 'implied direction' given district judges by Congress to fulfill 'their traditional duty in guiding the jury by indicating the consideration relevant to the latter's verdict on the facts.'" Coleman v. United States, 367 F.2d 388, citing and quoting from Bruno v. United States, 308 U.S. 287, 293. See also United States v. Tannuzzo, 174 F.2d 177; Affronti v. United States, 145 F.2d 3.

Lastly, Aiuppa contends that it was error for the trial court to refuse to grant a mistrial based upon prejudicial newspaper publicity, or, in the alternative, to at least voir dire the jurors whether they had read the newspaper publicity and were prejudiced thereby. He further argues that it was error for the court to permit the jury to separate for lunch during their deliberations and prior to the verdict so as to expose them to the prejudicial publicity and other possible influencing factors.

At the conclusion of all the evidence, and before the jury had been instructed, Aiuppa's counsel moved for mistrial on the grounds that the jury could not "reasonably give us a fair trial" due to two current newspaper stories. One of these stories was published on the first day of trial in the Kansas City Star and was headlined on page 4, "Jury Selected in Aiuppa Case. Chicagoan's Trial in U.S. District Court in Fort Scott Kansas." A subheadline read "Gangland Figure Found Guilty in 1963 but Won Appeal". The article went on to discuss Aiuppa's first trial, conviction and sentence and the suppression by this court of "more than 500 doves" found "in the trunk of the Aiuppa

Cadillac." The second article was published on the second day of trial in the Kansas City Times and was headlined, "Two Freeze Up in Aiuppa Case; Government Witnesses Refuse to Answer in Second Trial. Now Vague on Details". A subheadline erroneously read, "Judge Asks One 'Who Told You' to Forget Answers?" This article then recited various occurrences at the trial.

Judge Templar noted that "this has always been a problem for the trial courts, and under the provisions of the First Amendment I know of no way that this court can prevent an irresponsible newspaperman from publishing anything he wishes to publish * * *. This is apparently presenting some very serious problems for the courts * * *." But, he determined that "in order to grant a mis-trial in this case [the Court] would have to assume that the jurors have read this article and that it had left an impression and they believed what they read and took it into consideration. Now, the Court is specifically instructing them not to do this, and the Court feels that to grant your request [for voir dire of the jury] will not be proper. In fact it would have just the opposite effect in the establishment of a fair trial because it would then call to their attention something that may not have arrived at their attention." Thereafter, the court instructed the jury to the effect that "you are to disregard any information about this case which may have been received from sources outside of this trial. If any of you have read any newspaper articles or heard any radio broadcasts or telecasts related to this case, I want to caution you particularly that you are to put any such information entirely out of your consideration of this case, and you are to confine your consideration solely to the evidence adduced in this trial."

Each case relating to a claim of jury prejudice based on newspaper articles appearing during a trial must turn on its own special facts. See Marshall v. United States,

360 U.S. 310, 312. We have very recently considered the general problems confronting and principles applicable to the majority of cases of this type concluding that "The right to publish a prejudicial article does not carry with it the right of an accused to an automatic mistrial." Mares v. United States, Aug. 15, 1967, 10 CA, ... F.2d ..... We cannot say, from the facts in this case, that the published newspaper stories deprived Aiuppa of a fair trial. The stories were, to be sure, prejudicial. But, they were published in newspapers at least 100 miles from the scene of the trial. And, there is nothing in the record to indicate that they were generally circulated, or for that matter circulated at all, in the vicinity of the trial or that the jurors would likely be exposed to them outside of deliberately seeking them out. We will not presume either exposure or prejudice, i.e. see Welch v. United States, 371 F.2d 287, nor will we, in a case like this, impute to a jury a disregard of its duty to confine its verdict to the evidence adduced at the trial. And see Mares v. United States, supra. We think the trial judge took reasonably precautionary steps under the circumstances by instructing the jury to disregard any such publicity it might encounter.

As to whether the jury should have been allowed to separate for lunch, we have said that "sequestration imposes a hardship on jurors and should be ordered only in unusual cases." Mares v. United States, supra. As we have seen, there is nothing in the record to indicate that the jurors were exposed to the newspaper articles in question. And, we will not presume prejudice from such a separation where, as here, the trial court properly admonished the jury in regard to their conduct during separation. See Roth v. United States, 339 F.2d 863; and see Hines v. United States, 365 F.2d 649.

The judgment is affirmed.

APPENDIX B

MARCH TERM, THURSDAY, APRIL 25, 1968

Before Honorable Alfred P. Murrah, Chief Judge,
Honorable David T. Lewis, Circuit Judge, and
Honorable A. Sherman Christensen, District Judge.

JOSEPH AIUPPA, *Appellant,*	)	
9243 vs.	)	Appeal from the United States District Court for the District of Kansas.
UNITED STATES OF AMERICA, *Appellee.*	)	

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Kansas and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby affirmed.

It is further ordered by this court that Joseph Aiuppa, appellant, surrender himself to the custody of the United States Marshal for the District of Kansas, in execution of the judgment and sentence imposed upon him, within ten days from and after the date of the filing of the mandate of this court in said district court.

A true copy
Teste
William L. Whittaker
William L. Whittaker
Clerk, U. S. Court of
Appeals, Tenth Circuit

(SEAL)

APPENDIX C

Joseph AIUPPA, Appellant,

v.

UNITED STATES of America, Appellee.

No. 7560.

United States Court of Appeals, Tenth Circuit
November 9, 1964

Maurice J. Walsh, Chicago, Ill., for appellant.
Newell A. George, U. S. Atty., for appellee.
Before MURRAH, Chief Judge, and HILL and SETH, Circuit Judges.

MURRAH, Chief Judge:

This is an appeal from a conviction and sentence by the Court, a jury having been waived, on a two-count Information charging the appellant with unlawful possession and transportation of migratory birds (mourning doves), in violation of 16 U.S.C. § 703.[1]

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[1] 16 U.S.C. § 703 provides: "Unless and except as permitted by regulations made as hereinafter provided in sections 703-711 of this title, it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill, possess, offer for sale, sell, offer to barter, barter, offer to purchase, purchase, deliver for shipment, ship, export, import, cause to be shipped, exported, or imported, deliver for transportation, transport or cause to be transported, carry or cause to be carried, or receive for shipment, transportation, carriage, or export, any migratory bird, or any part, nest, or egg of any such birds, including in the terms of the conventions between the United States and Great Britain for the protection of migratory birds concluded August 16, 1916 (39 Stat. 1702), and the United States and the United Mexican States for the protection of migratory birds and game mammals concluded February 7, 1936."

On pre-trial the appellant moved, pursuant to Rule 41(e), F.R.Crim.P. that the seized property "to-wit, approximately 560 frozen birds * * * be returned to him and that said property be suppressed for use as evidence," on the ground that "[s]aid unlawful search and seizure was made in the nighttime from an automobile belonging to the [appellant] and located upon the premises * * * which constitute his home, and the seizure was against his will and without a search warrant."

Pursuant to a hearing on the motion to suppress, the trial Court specifically found " * * * there was a search of [appellant's] effects, the automobile"; that "there was no consent to the search of the automobile, either voluntary or otherwise"; that "the search was not incident to a lawful arrest"; and "there was a seizure." The Court then observed that the only question on the motion to suppress was "whether there was probable cause for this search." The Government agreed, and the search and seizure was finally sustained and the seized doves admitted in evidence against the appellant, on the ground that the Agents had probable cause for the search without a warrant.

The search and seizure of the mourning doves was conducted by Federal Game Management Agents acting under authority of 16 U.S.C. § 706,[2] which pertinently

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[2] On trial, one of the Government Agents testified as follows:

"Q. [By defense counsel] Now, are you — that is the total of your authority as an officer, isn't it, you are a game management officer for the government? A. Yes, sir.

"Q. You don't hold any commission or office as any other type of enforcement officer? A. No, sir.

"Q. Or civil officer? A. No, sir.

"Q. And you know, do you not, that these offenses you were investigating were misdemeanors? A. I know that, sir.

provides that such Agents " * * * shall have power, without warrant, to arrest any person committing a violation of said sections [16 U.S.C. §§ 703-711] in his presence or view and to take such person immediately for examination or trial before an officer or court of competent jurisdiction; * * * and shall have authority, with a search warrant, to search any place." The statute also authorizes judges and commissioners " * * * upon proper oath or affirmation showing probable cause [to], issue warrants in all such cases."

On appeal the Government seems to admit, as indeed it must, that the Agents were acting solely under authority of § 706, supra. It does not contend that the search was made as an incident to a lawful arrest or under authority of a search warrant. In these circumstances, we do not have the question of the power and authority of a private person to search and seize as an incident to a lawful arrest, as in Wion v. United States (10 C.A.), 325 F.2d 420. Nor, do we have the question of the authority of the Agents to seize and then search a vehicle for contraband, as in Sirimarco v. United States (10 CA), 315 F.2d 699. The Government seeks to sustain the search and seizure solely

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"Q. And are you familiar with Section 706 of Title 16 of the United States Code?

* * * * *

"A. Yes, I'm familiar with this section.

"Q. And that section outlines your authority in connection with the migratory game bird treaties and laws under it?

"A. Yes, sir.

"Q. And did you have in mind at the time that you made this search, this arrest and search, that you should have authority with a search warrant to search any place? A. No, sir.

"Q. You didn't have a search warrant of course?

"A. No, sir."

on the ground that its Agents, acting within the scope of their statutory authority, were impowered to search and seize without a warrant for probable cause. On this premise it contends that the evidence on the motion to suppress supports the trial Court's finding of probable cause.

The fallacy of this premise is that it assumes the power to make a warrantless search on probable cause — a power which the statute (§ 706, supra) does not grant and, by plain implication, withholds from these special enforcement Agents. While the statute authorizes an arrest without a warrant for violations committed in the Agent's presence or view, it does not authorize a warrantless search. Instead, it expressly delegates to judges and commissioners authority to issue warrants in all such cases, upon a proper showing of probable cause. It is thus manifestly clear, we think, that Congress deliberately withheld from these Agents the province of determining for themselves the existence of probable cause and the exceptional circumstances which would justify an expeditious warrantless search. This interpretation of the statute is consonant with the highly restricted province of any enforcement officer to appraise the extraordinary circumstances under which a search without a warrant would be justified. See: Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723; Brinegar v. United States, 338 U.S. 160, 69 S.Ct. 1302, 93 L.Ed. 1879; Johnson v. United States, 333 U.S. 10, 68 S.Ct. 367, 92 L.Ed. 436; Taylor v. United States (10 CA), 333 F.2d 721; United States v. One 1957 Ford Ranchero Pick-up Truck (10 CA), 265 F.2d 21; and Hart v. United States (10 CA), 162 F.2d 74.

The motion to suppress did not specifically refer to the statutory limitations of the searching Agents, but it was made pursuant to Rule 41(e) and followed the prescribed

Form 16, F.R.Crim.P. In this form, it was certainly sufficient to challenge the lawfulness of the seizure and the supportive evidence was entirely sufficient to require the Government to legally justify the search without a warrant. The Government does not now complain of appellant's failure to specifically invoke § 706, supra. Indeed, it does not deny that the statute is the full measure of the Agents authority in this case. We hold that the search and seizure was conducted without statutory authority and, therefore, cannot be sustained for probable cause. The motion to suppress should have been granted, and the case is reversed with directions to proceed accordingly.

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In the Supreme Court of the United States

OCTOBER TERM, 1968

JOSEPH AMABILE,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1967

NO.

JOSEPH AMABILE,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Petitioner, Joseph Amabile, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in this cause on April 26, 1968.

OPINIONS BELOW

The majority and dissenting opinions of the Court of Appeals (not yet reported) are reprinted as Appendix A, *infra*. The majority and dissenting opinions of the Court

of Appeals in the related, but separate, appeals of Petitioner's co-defendants at trial (United States vs. Battaglia and Evans, Nos. 16312 and 16313 in the United States Court of Appeals for the Seventh Circuit) (not yet reported) are reprinted as Appendix B, *infra.*

JURISDICTION

The judgment of the Court of Appeals (Appendix C, *infra*) was entered on April 26, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

I. Whether it is a violation of the Hobbs Act (18 U.S.C. Section 1951) to extort money from a businessman whose business receives supplies shipped in interstate commerce where the threat of extortion is to injure the businessman and members of his family but does not carry with it, express or implied, a further threat to obstruct, delay or affect any aspect of the business, and the only effect claimed is the depletion of the assets of the business by reason of a subsequent payment of money?

II. Whether proof that alleged co-conspirators combined and agreed with Petitioner in a scheme to defraud is a sufficient basis from which to infer that they also agreed to commit extortion, where there is no evidence that they knew or approved of Petitioner's unilateral act of threatening the victim and the entire scheme had previously been conducted by trickery and deceit rather than by violence or threat of violence? And whether, if the answer to the foregoing is in the negative, Petitioner could be convicted of conspiring to violate the Hobbs Act in the absence of evidence that he agreed with anyone to threaten the victim?

III. Whether refusal to allow Petitioner to inquire on cross examination of the principal Government witness if he was a defendant in a pending state court indictment for a felony, if he was being investigated for income tax evasion, and if he expected favorable treatment in these matters in consideration for his testimony, all for the purpose of showing motive, deprived Petitioner of the right of cross examination guaranteed by the Sixth Amendment? Whether Petitioner was deprived of this same Sixth Amendment right by the ruling of the trial judge prohibiting him from asking this witness to point out, in a pre-trial statement given to agents for the Government, where complaint of certain specific threats, about which the witness had testified, had been recorded after the witness had answered that the complaint was contained in the statement; and, in prohibiting him from asking the witness if he had made this complaint in four other statements given to the Government agents?

IV. Whether Petitioner was properly denied access to the minutes of the grand jury testimony of certain key Government witnesses, and whether a new procedure, granting defendants access to such minutes as a matter of right, may be limited to prospective cases?

The foregoing questions are discussed in this petition. Questions V and VI which follow are reserved for argument on the merits in connection with related questions presented.

V. Whether Petitioner was deprived of his right of cross examination by the ruling of the trial judge prohibiting the defense from ascertaining the address of the principal Government witness?

VI. Whether evidence of threats, made one to two years prior to the commencement of the alleged conspiracy, by another, known to the Grand Jury and not alleged to be a co-conspirator, were relevant?

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

Sixth Amendment, Constitution of the United States, provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him; * * *"

Section 1951, Title 18, United States Code, provides:

> "*Interference with commerce by threats of violence.*
>
> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years or both.
>
> "(b) As used in this section—
>
> "(1) The term 'robbery' means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

"(2) The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

"(3) The term 'commerce' means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction."

STATEMENT

Petitioner Joseph Amabile together with Salvatore Battaglia[1] and Dave Evans[2] were indicted by the United States Grand Jury for conspiracy to violate the Hobbs Act (18 U.S.C. Section 1951). The one-count indictment charged that, beginning in or about July, 1964, the three named defendants, an unindicted co-conspirator, Rocco Pranno, and others unknown to the Grand Jury conspired to obstruct, delay and affect interstate commerce by extorting $48,500 from the Riley Management Corporation, a firm engaged in the construction of multiple dwelling units ("King Arthur Apartments") in Lansing, Illinois. The indictment, containing requisite allegations that "the movement in interstate commerce of materials, supplies, and other commodities required for the construction, sale, rental and management of said multiple dwelling units" was to

[1]Appellant in No. 16312 in the Court below; Petitioner in No. ....., October Term, 1967.

[2]Appellant in No. 16313 in the Court below; Petitioner in No. ....., October Term, 1967.

be obstructed, delayed and affected, alleged that the conspiracy continued to the date of the return of the indictment, February 16, 1967. (I App. 2, 19-21)[3]

Following trial by jury, the defendants were all found and adjudged guilty. Petitioner was sentenced to the custody of the Attorney General for a term of fifteen years and to pay a fine of $10,000. (I App. 91-2) In separate opinions[4] the Court of Appeals affirmed all convictions by a two to one vote.

The following facts are grouped in the same order as the corresponding reasons for granting the writ to which they are pertinent.

I. A threat of extortion must have a reasonable causal relation to interstate commerce in order to violate the Hobbs Act.

Background of original scheme to obtain money "by fraud and deceit."[5]

During the years 1964 and 1965, William Riley was the president and principal stockholder of the Riley Manage-

---

[3] "App." references are to the volume and page of the Joint Appendix for Appellants as printed for the Court of Appeals.

[4] The appeals of Battaglia and Evans were heard together and decided in an opinion filed January 9, 1968. Their Petitions for Rehearing and Suggestions that Rehearing be heard *en banc* were denied April 17, 1968. Petitioner's appeal was heard separately and decided, by the same three-judge panel, in an opinion filed April 26, 1968. No Petition for Rehearing was filed in response to this judgment. The majority opinion in each case was written by Judge Cummings and concurred in by Judge Schnackenberg. Judge Swygert wrote a dissenting opinion in each case.

[5] The phrase is Judge Swygert's. See, App. B, *infra*, p. App. 55.

ment Corporation, a company engaged in real estate development, construction of apartment projects, and the rental and management of such properties. (II App. 489-90) In June 1964, Riley told defendant Evans, eventually his construction superintendent for the project, to begin lining up subcontractors for construction about to be started in Lansing, Illinois. Evans was cautioned to keep the project a secret from Petitioner and one Nick Palermo, for Riley was fearful that he would be forced to use their services if they learned of it. (II App. 502)

A few days after that conversation, Riley met with Palermo and Petitioner in the office of Palermo's Melrose Park Plumbing Company. Palermo asked for an opportunity to bid on the plumbing contract for the Lansing project. Riley demurred. Petitioner then told Riley that, if he did not give them the work, he would stop other Riley projects in Northlake and Westmont, Illinois, and they would put him out of business. Amabile said he knew how to handle "wise guys" and Riley "would be walking the streets with a candy cane." He also said he knew where Riley's mother lived, where his kids went to school, and they had a baseball bat to handle "wise guys" like Riley. (II App. 506-7)

Shortly thereafter Riley told Evans about the meeting with Amabile and Palermo, adding that he was disgusted and frightened that they had learned of the impending Lansing project. He reiterated, however, that he could not use them and told Evans, if he were contacted by them, to pretend to give them work, but not to do so.[6] (II App. 511-12)

---

[6] Eventually, however, in September or October 1964, Riley gave the Lansing plummbing contracts to Palermo because, as he testified, he was afraid of Amabile and Palermo. He explained that he feared economic ruin, that his existing projects in Northlake and West-

Riley had another conversation with Evans, in June, July or August 1964. At this time he informed Evans that he had borrowed sufficient funds to begin the underground work on the Lansing project and instructed him to obtain a good sewer contractor, one who was "foreign" to Amabile and Palermo. (II App. 515) At about the same time, Amabile told one Mike DiVito and alleged co-conspirator Rocco Pranno that he and Riley had purchased some property in Lansing and they had a number of buildings under construction. Amabile explained that a lot of building, sewer and water main construction, and paving was being done. DiVito inquired whether he could obtain some of the sewer and water main work, and Amabile answered that it was possible, but, if he did, Amabile did not want DiVito's name associated with the contracts. (I App. 120-1)

At a subsequent meeting Petitioner told Pranno and DiVito, in response to a further inquiry from them, that they could get the sewer and water main contract if they

---

mont, Illinois, would be stopped, and that physical harm would come to his family and employees. (II App. 508-11) The Northlake project had already been completed at this time, however. (I App. 122, 127, 249)

Palermo, although well-known to the Grand Jury at the time of the return of the instant indictment, as evidenced by the Grand Jury's simultaneous return of an indictment charging him with a similar offense against Riley, was not charged as a defendant or as a co-conspirator non-defendant in the instant case. It is not clear just what significance "giving the contract" to Palermo had for the instant case, nor is it clear what contracts were given. Riley testified he gave the contract to "Melrose Park Plumbing, Melrose Park Electric, Melrose Park Heating, Melrose Park Painting, Melrose Park et cetera, et cetera." (II App. 513) It is clear, however, that Palermo was not given the sewer contract in conjunction with which the charged extortion of $48,500 took place. See, text, pp. 9-10, *infra.*

came up with a "good clean fellow" to do the work for them. (I App. 123-24) In September 1964, Pranno and DiVito hired one Henry LaKey as president of Carlson Construction and Equipment Company, a firm to be organized to meet the requirements for the Lansing project. (App. 125-27)

Subsequently in September, according to one version, DiVito, Evans, Pranno and Amabile met in the latter's apartment to discuss the sewer contract for the Lansing project. Pranno told Amabile they had LaKey to do the work for them. Amabile assented, but demanded $20,000 in cash before giving them the job. After looking at the plans, specifications and figures which Evans then provided, DiVito advised Pranno that they would be able to pay this amount. Thereupon Pranno told Amabile he would give him the $20,000 in cash, and Amabile accepted. Afterwards, Pranno told DiVito never to say anything in front of Evans because he was Amabile's "guy" and it would get back to him. (I App. 128-29)

According to LaKey's version, he — and not Pranno — was present at this meeting. Amabile said to DiVito: "Mike, I'm giving you this job. I want this job done right. I don't want no problems with this job and I don't want no trouble with it. I can give the job to anybody I want, but I'm giving it to you and Jimmy [Pranno]. I don't care about nothing else, I get my 20 grand off the top." (I App. 254-56) DiVito and LaKey returned to Pranno who, when Amabile's demand was conveyed to him, told DiVito he would talk to him about it at another time. (I App. 261)

In September Evans told Riley he had procured an excellent sewer contractor, Carlson Construction Company, operated by a Mr. LaKey, to do the work in Lansing.

Riley inquired about LaKey's reputation and ability, and Evans assured him that the company's reputation was excellent and that it could do the job: (II App. 516)

The Carlson Construction and Equipment Company was formed in October, 1964. LaKey, the president, received a 10% interest in the corporation; DiVito and Pranno each received a 45% interest. (I App. 130-32). Thereafter the corporation was awarded the sewer and water main construction contract for approximately $150,000. Carlson was to install the sewers, the sewer mains, the water mains and a lift station. It was to paid in three draws for work installed in place every 30 days upon the inspection and approval of the engineer in charge of the project and Evans. (I App. 132-33; 270).

Also in October, Pranno told DiVito and LaKey to meet with Amabile and Evans. At that meeting DiVito told Amabile that he had talked to Pranno and the two of them had concluded there was not enough in the original contract to pay out the money "off the top." Amabile told DiVito that he had taken the job and that he knew what it consisted of. DiVito said that they had to have more money or they did not want the job. (I App. 262-65). Amabile then instructed Evans to devise a way to obtain more money from the job. Evans and DiVito discussed methods of doing this, the discussion ending with Evans' tearing up the original contract calling for payments of approximately $150,000 and writing a new contract providing for payments of $199,600. (I App. 265-67)

Work began on the project in early October. (I App. 135) Fabricated steel forms and prefabricated sewerage pumping stations, manufactured in Missouri and Iowa, were delivered to the project in Lansing, Illinois. (I App. 103, 234, 236, 238, 241) No shipments of materials were

delayed. Because of an urgency, shipments in one case were made quite rapidly from Granco Steel Company, St. Louis, Missouri: "These shipments had been expedited rather than delayed." (I App. 108) Iron pipe shipped to the construction site was installed as soon as it arrived. (I App. 288) A lift station, shipped from Kansas, was installed three days after receipt. (I App. 288)

Toward the end of October Evans told LaKey that he did not want him talking to certain engineers on the job because he was afraid LaKey would tell them Evans knew Amabile, and, if that got back to Riley, he, Evans, would be in trouble. (I App. 285-86) Some time later Evans told LaKey, in reply to the former's inquiry about the letting of contracts, that the only contracts he let at Lansing were the ones Amabile told him to. (I App. 283-84)

Carlson was to be paid in three draws. (I App. 269) A few days prior to the first draw, Amabile told LaKey to prepare the paper work. Two days later LaKey returned with the papers and told Amabile that the amount of the draw was $57,000. (I App. 289-91). Amabile said that he would contact Evans and straighten it out. LaKey was told to come back the next day. (I App. 295)

When LaKey returned, Amabile told him Evans was in the hospital. On the way to the hospital Amabile said that he was going to give Evans a $5,000 "cut" instead of $7,500. (I App. 297) At the hospital Amabile gave Evans a "wad of bills" with which Evans expressed satisfaction. Then Amabile instructed Evans to go over the papers for the draw with LaKey. Evans did so, crossing off a number of items on the estimate sheet. When LaKey inquired about this, Evans told him he would draw the money Evans told him to draw, and Amabile told him to listen to Evans. Evans then had LaKey obtain a new

estimate from the engineering firm which he, Evans, later approved. LaKey questioned the new figure, $47,517.97, as quite a drop from the original. Evans said those were his instructions from the other men for whom he worked. (I App. 299-302) The draw was made on November 12, 1964.

LaKey received the check for this draw and, from its proceeds, deposited $39,000 in Carlson's account at the Colonial Bank, gave Pranno $8,000 in cash and retained $517 for his wages. (I App. 304-5) Three days later, on Amabile's instructions, he withdrew $20,000 from Carlson's account and gave it to him in cash. (I App. 305-7) When DiVito asked LaKey, a few days later, about paying bills with the proceeds of the draw, LaKey told him not to worry, he was paying them. Then he added that Amabile wanted $10,000 from the draw and he had given it to him. (I App. 144-45)

Shortly after the draw LaKey asked Evans how they were able to charge so much for various materials and installations without anyone's becoming suspicious. Evans answered that he was in Riley's office to take care of these matters and for LaKey to mind his own business. At that point Amabile walked up, and, upon being told by Evans that LaKey was getting too nosey, told LaKey to mind his own business, that Evans worked for him, he had put Evans in that office. (I App. 308-9)

After Carlson had received the first draw Riley told Evans that he had been advised of complaints from supply contractors that Carlson was not paying its bills. Evans replied that he could not understand the problem, he was happy with Carlson, and he would take care of the matter. (II App. 523-25) Shortly thereafter, Riley repeated this complaint to Evans, telling him that the lending institution,

by whom the pay-outs were made, had received complaints from the suppliers. Again, Evans promised to look into the matter. (II App. 527)

In January 1965, LaKey told Evans that Carlson did not have sufficient funds to pay for necessary work and materials. Evans said not to worry, he would talk to Amabile and Amabile will talk to "the man" and they would see that the money was in the bank for him. (I App. 327)

Events precipitating threat of extortion.

In January 1965, Amabile told LaKey to prepare the papers for the second draw. LaKey prepared a request for $60,000 and brought the papers to Amabile. Amabile said he had told LaKey never to draw over $48,000; he did not want that kind of money taken out of the account at that time. He told LaKey to leave the papers with him and he would have Evans straighten the matter out. That night LaKey received a telephone call from Evans saying that Amabile had told him to check with LaKey about the draw. (II App. 343-44) Later, Evans went to LaKey's home and they went over the papers. Evans arrived at a figure of $48,000. He then approved the draw and told LaKey to take it to the comptroller for a pay-out slip. (II App. 344-45)

The comptroller refused to authorize the pay-out. From his office LaKey went to Amabile, relating, in Evans' presence, what had happened. Amabile said they would have to take care of that and instructed Evans and LaKey to see Riley the next day. (II App. 346)

Evans and LaKey went to the office together, although at Evans' request they entered separately. When LaKey told Riley that he was there for the pay-out slip for the

second draw, Riley replied that Carlson's bills had not been paid and he would authorize the pay-out only after they were. LaKey said he could not pay them until he received the draw, explaining that, as the contract had been increased to $200,000, there were not enough funds in the bank to pay all of the draws. When Riley asked Evans to explain why the contract had been increased, Evans said they had raised the price to get the job done because of complications. (II App. 349-50; 530)

The threat.

LaKey returned to Amabile and reported that Riley had refused to authorize the second draw. Amabile told LaKey to meet him the next morning and he would go with him to get the matter "straightened out once and for all." (II App. 351)

Amabile and LaKey went to Riley's office the next morning. Amabile asked Riley why he would not pay LaKey. Riley answered that he could not pay him until LaKey paid his suppliers, that the suppliers had threatened to encumber the project with liens. Amabile replied: "I don't care nothing about that. The man's got his money coming, Bill, I want you to pay his money." At that point, Amabile and Riley went into the far corner of the office where LaKey could not hear the conversation, but could see Amabile moving his arms and doing most of the talking. (II App. 352)

Riley testified to the following version of the meeting:

> "Mr. Shine [Amabile] told me that I had to pay this man, that this man was a friend of theirs; that I was expected to pay them; that if I didn't pay them all sorts of people would get mad.
>
> "I told Joe that it would be foolish for me to make this payment; that they were just pushing this com-

pany to ruination; that it just was absolutely ridiculous to pay this man and that I did not want to pay him. (II App. 533-34)

• • •

"[After we left LaKey] Mr. Shine [Amabile] told me that I had no choice on this matter; that I had to pay this man; that the man wanted him paid.

"I told him that this was silly. I had a big loan pending with Equitable Life and this thing would, it could destroy everything that we were trying to build up. I told him that, in fact I begged him not to have to pay him. He told me that I had to pay him. (II App. 534)

• • •

"He told me the man said I had to pay him and he told me if I didn't pay him there would be all sorts of trouble, and there was no sense in me making this trouble for myself so I better pay him because he was a friend of theirs." (II App. 535)

Amabile then returned to the portion of the office where LaKey was standing, smiled and winked at LaKey, and told him he would receive his money. Then he turned to Riley and said: "Don't forget, Bill, I want you to pay this man. I want you to pay him now. You know what I mean." (II App. 353) After they left, LeKey asked Amabile how he was able to tell "a big man like Riley" what to do and what not to do. Amabile gestured with his fist and replied: I got this son of a bitch right here, • • • He's afraid of me." (II App. 354)

Two days later, LaKey received the $48,512.48 pay-out. (II App. 354-55) He deposited the check in Carlson's account at the Mount Prospect Bank (II App. 356) which Amabile had instructed him to open for the prospective

second draw in October 1964. (I App. 327-29) Later, at Amabile's direction, LaKey withdrew $17,000 in cash which he brought to Amabile's apartment. From the $17,000, Amabile gave LaKey $5,000; LaKey in turn gave Evans $1,000.[7] (II App. 360-61)

Riley authorized this second draw, as he testified, because he was afraid of Amabile; he had been subjected to previous threats of physical harm to himself his family and employees, and with economic harm to his company.[8] (II App. 536, 538, 566)

In response to Petitioner's contention that this evidence did not demonstrate a violation of the Hobbs Act, the majority below held: 1) "Since Congress has used all its 'broad and sweeping' commerce power in enacting the Hobbs Act, the courts have rightly attributed great scope to the statute." 2) "As in [*Hulahan* v. *United States,* 8th Cir. 1954, 214 F.2d 441, *cert. den.,* 348 U.S. 856], Amabile was exacting tribute from a builder 'dependent upon interstate commerce for materials, equipment and supplies' and was therefore within the reach of the Hobbs Act." 3) "As pointed out in our prior opinion [*United States* v. *Battaglia,* 7th Cir. 1968, ... F.2d .....], the $48,500 payment made pursuant to Amabile's threats depleted Riley Management Corporation's reserves. Depletion is pertinent in considering commerce under the Hobbs Act." 4) "The Hobbs Act does not require that the threats to Riley and his family be directly aimed at interstate commerce. * * * There is no requirement that the extortion be directed at interstate commerce as long as the extortion

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[7] At the same time, Amabile instructed LaKey not to tell Pranno or DiVito about the money or the new bank account. (II App. 360)

[8] See Statement Point III, *infra,* pp. 28-29 n. 11.

'in any way or degree obstructs, delays, or affects commerce' * * *'' (App. A, *infra*, pp. App. 2-4)

The dissenting Judge, on the other hand, concluded: 1) ''There was no evidence * * * that there was any delay in the shipment or delivery of [materials obtained from suppliers located without Illinois]. Moreover, there was no evidence that any extortion threat directed against Riley carried with it, express or implied, a threat that the work on the Lansing project would be stopped or hindered.'' 2) ''* * *[A] threat to extort proscribed by the Hobbs Act must have a reasonable causal relation to interstate commerce. The likelihood of an obstruction to the flow of commerce must be the result of the threat. This *essential nexus is missing in the instant case.*'' 3) ''*In the* instant case * * * there was no * * * probability that Amabile's threats to Riley, if not complied with, would have resulted in the interruption of the shipment of construction supplies and materials for the Lansing project. (In fact, it was to Amabile's advantage that the Lansing project proceed without interruption; for only then would Riley have authorized Carlson Construction Company to request 'draws' for funds * * * *)'' 4) ''If a depletion of reserves is all that is necessary to show the requisite affect on commerce, then a threat of any kind to extract money made to a person who happens to operate a business engaged in interstate commerce comes within the statute's proscription. * * * I do not believe that the Hobbs Act was intended to have such a broad reach.'' (App. A, *infra*, App. 13-16)

II. There was no proof that Petitioner conspired to extort money from Riley or the Riley Management Company.

The activities of the co-defendant Dave Evans in those matters leading to the payment of the $48,500 second draw have been detailed in Point I of the Statement, *supra*. After

receiving the $5,000 from Amabile, LaKey, at Amabile's request, went to Florida. Shortly thereafter, Evans called and advised LaKey that Amabile wanted him to return to Chicago. LaKey returned and met with Evans and Amabile. Amabile complained that, by not paying bills, LaKey had gotten him in trouble with Riley, had gotten Riley in trouble, and was "making Dave Evans lose his job." (II App. 361-63) A few days later, LaKey complained to Evans that the bills were unpaid because of Amabile's actions. Evans agreed but advised LaKey to follow orders. LaKey asked Evans why he did not get out of the business and Evans replied that he could not quit as he was in too deep, he knew too much about the other people and he owed Amabile too much money. (II App. 363-64)

Pranno's activities have also been described, although in less detail.

Evidence concerning Rocco Pranno.

Within a week or ten days after work on the Lansing job began, Amabile told DiVito, who had been assisting LaKey at the construction site, to stay off the job and that he would have trouble if he did not stay away. DiVito relayed this to Pranno and then returned to the site. (I App. 140-43) Amabile repeated his warning to DiVito later in October. Again DiVito relayed the matter to Pranno who instructed DiVito to return to the job, telling him he would accompany him there. Pranno did this for a few days. Later, however, Amabile warned DiVito a third time, telling LaKey, in DiVito's and Evans' presence: "I thought I told you to keep Mike DiVito off the job. We don't want him on the job. He is too well known. We don't want Riley people seeing him on the job and he might get Dave Evans in trouble. He will get my man in trouble, Dave Evans, at the Riley office." DiVito did not return to the job site after this. (I App. 143; 279-81)

At about this time, Pranno complained to DiVito that LaKey was not reporting to him on the progress of the job. LaKey joined them a few minutes later and Pranno shouted at him not to frequent Amabile's club, but to frequent Pranno's where he belonged. (I App. 149-50) A similar scene between Pranno and LaKey, with DiVito present, took place in late December. Pranno raised a chair as if to hit LaKey and yelled at him, saying: "What are you always doing by Joe Shine's [Amabile's] place? Are you his partner?" LaKey denied this, and at that time Amabile walked in. Pranno repeated he did not want LaKey going to Amabile's club and then Amabile and Pranno had a private conversation. (I App. 151-54)

After LaKey deposited the proceeds of the second draw in the account at the Mount Prospect Bank, which he had opened in October at Amabile's directions (II App. 356), Amabile instructed him not to tell DiVito or Pranno about the new bank account or the money. This conversation took place immediately prior to the distribution of $17,000 from that draw. (II App. 360-61; see Statement Point I, *supra*, pp. 15-16.)

In mid October 1964, Pranno had given DiVito and LaKey approximately $13,000 to open a bank account for Carlson at the Colonial Trust & Savings Bank. (I App. 135-37; 273-75) Sometime later, but prior to the first draw, DiVito, LaKey and Pranno borrowed an additional $5,000 for operating expenses which LaKey was to deposit in the Carlson account. (I App. 146) This $5,000 was due to be repaid on January 5, 1965. On or about that date, both Pranno and DiVito met with Amabile, complained that they could not find LaKey and asked Amabile to help them get the $5,000 back from LaKey. (I App. 154-55; 158-59) Several days later, they again met with Amabile, and Pranno said that, if Amabile could not help locate LaKey,

he was going to the "Farm to see the 'man.'" Amabile said to go ahead. (I App. 161) As they left, Pranno told DiVito he did not understand why "The Man" took Northlake away from him and gave control of it to Amabile (I App. 161-63) when he was doing so well there. (I App. 166-67)

Evidence concerning Sam Battaglia.

In November or December 1964, prior to the above conversation, Amabile took LaKey to a horse farm owned and operated by Battaglia. LaKey was introduced to Battaglia as the man who was "running the job for them in Lansing, Illinois." (I App. 329-30) As Battaglia and Amabile returned from a private conversation, Battaglia asked why Evans was receiving "that kind" of money. Amabile answered: "I made a deal with the man. The man got us the job. * * * I promised him $7,500, I'll take care of it." (I App. 332-33) While they were driving back, Amabile asked LaKey if he knew who they had just seen and, receiving LaKey's answer that he did not, said it was none of LaKey's business, that he would find out later. (I App. 333-34) LaKey did some work at the farm the following Sunday. When he returned, he asked Amabile why he had not been told that the farm belonged to Battaglia. Amabile told him to forget he had been to the farm. (II App. 337-38) The following day, LaKey told Evans of his trip to the farm. Evans said not to talk about that and not to let Amabile hear him talking about it. (II App. 339-40)

Pranno and DiVito drove out to the "Farm to see 'The Man'" about LaKey in late February or early March 1965. They met Amabile there. After a short wait, Battaglia arrived. In response to an inquiry by Battaglia as to what he could do for them, Pranno said: "You know about this Riley deal in Lansing where we got Hank LaKey

to set up the company and do the work for us and figure $20,000 in for you." Battaglia "nodded." Pranno said: "Joe Shine [Amabile] got us the job and the[illegible] Hank LaKey away from us." Amabile denied this. [illegible]no repeated that he did, and Battaglia told the two "cut it out." Pranno then continued: "You know we had to borrow $5,000 to keep this job in Lansing going and now I can't find LaKey, and you know there was $20,000 in this deal for you." Battaglia nodded and said "Yes." Then Pranno said: "I want to know what Joe Shine is doing to me. I want you to tell Joe Shine to get that $5,000 from LaKey so that we can pay back this loan." Pranno also said LaKey was a "No good s.o.b." Battaglia replied that he did not think LaKey was "such a bad guy," that he liked him and liked to work with him, and that they had other things coming up on which they could use him again because he was "clean." After a pause of a few minutes, Battaglia told Pranno that he would see what he could do for him, and DiVito and Pranno then left. (I App. 171-72)

On their return, Pranno told DiVito he had told Battaglia that there was $20,000 in "the deal" for him because "he thought that Joe Shine was shortchanging 'the man' * * * [by telling him that] there probably maybe was $10,000 in it for the man and keeping the other $10,000 for himself." Pranno went on to say that he did not see how "the man" would let Amabile do this to him. (I App. 174)

The majority ruled[9] there was evidence to show that the extortion was pursuant to a conspiracy of which Evans was a member because: 1) "On this record, it is obvious that Evans knew of Riley's fear of Amabile." 2) "Evans

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[9] *United States* v. *Battaglia, et al.*, 7th Cir. 1968, ... F.2d ....., See App. B, *infra.*

knew that Riley was unwilling to pay the second draw * * *" 3) "The jury could properly infer that Evans knew Amabile would induce Riley—through fear—to authorize the second draw." 4) "Even though he may not have spoken to Amabile about the second draw, Evans' own statement to LaKey showed his willingness to take part in a course of action which would show payment by coercion." 5) "It would be unreasonable to suppose that Evans would be so closely associated with Amabile in the scheme to defraud without realizing that Amabile would employ coercive means for obtaining the second draw." 6) "* * * Evans is chargeable with his co-conspirator's acts in furtherance of the conspiracy." (App. B, *infra*, pp. App. 30-31)

Judge Swygert concluded: "The evidence with regard to Evans shows that the only agreement or 'common design and undertaking' to which he was a party was one to bilk the Riley company by means of fraud and deceit out of money earmarked for the Lansing job." (App. B, *infra*, p. App. 55)

As to Battaglia, the majority found that from the evidence of Battaglia's statement during the February or March 1965 meeting (subsequent to the second draw), to the effect that he liked LaKey and they could use him in other matters because he was clean, "* * * the jury could infer that Battaglia had embarked 'on a criminal venture of indefinite outline' * * ** He was committed to a long-term relationship contemplating the use of LaKey in numerous ventures. * * * Since Battaglia [admitted he] had a stake in the outcome of the conspiracy, even the stringent test of conspiracy liability evolved * * * in *United States* v. *Falcone*, 109 F.2d 579, 581 (2nd Cir. 1940), affirmed, 311 U.S. 205, was satisfied. * * * Being an associate of Amabile in this venture Battaglia is properly chargeable with knowledge that his confederate, Amabile, would resort to threats

if necessary to extract money from Riley. Battaglia had to 'take his chances' as to the methods used by the other co-conspirators. * * * Evidence of knowledge of the details of the plan or of participation of others is not required." (App. B, *infra,* p. App. 32)

Contrariwise, Judge Swygert felt: "The slender reed on which the Government depends to demonstrate an agreement to extort between Amabile and Evans is not even present with respect to Battaglia." He concluded: "On this record there is absent any evidence, direct or circumstantial, demonstrating that Battaglia knew that money was to be extorted from Riley or that threats were to be made to Riley by Amabile." (App. B, *infra,* pp. App. 58, 59)

In Petitioner's appeal, the majority rejected his contention that the evidence failed to establish a conspiracy with a reference to its prior decision in *Battaglia.* (App. A, *infra,* p. App. 2) Judge Swygert repeated his view that "* * * there was insufficient evidence of a conspiracy engaged in by Amabile with Battaglia and Evans 'to obstruct, delay and affect commerce'* * * by means of extortion." (App. A, *infra,* p. App. 13)

III. Refusal to permit Petitioner to inquire on cross examination a) into facts showing motive of William Riley for testifying and the consideration he received therefor, and b) regarding his failure to mention previous threats of physical violence by Petitioner and another in prior statements given to Government Agents, deprived Petitioner of the right of cross examination guaranteed by the Sixth Amendment.

A. During cross examination of William Riley, counsel for Petitioner attempted to show that Riley was under in-

dictment in the Circuit Court of Cook County, Illinois, for theft,[10] that he was under investigation by the Internal Revenue Service for suspected income tax evasion, and that his testimony in this case was given in the hope and expectation of securing favorable consideration in both those matters from the law enforcement officers involved. The following took place (II App. 615-18):

* * *

Q. Are you the same William G. Riley who was indicted by the Criminal Court of Cook County for thievery in 1966 in the month of February.

Mr. Lamendella: I will object to that, your Honor,

The Court: I will sustain the objection. Mr. Bellows, you know better than that.

Mr. Bellows: I will connect it up, your Honor.

The Court: Mr. Bellows, you know better than that and I direct the jury to disregard that question.

* * *

Mr. Bellows: May I have a side-bar conference, your Honor, with reference to this?

The Court: No, no side-bar conference after those questions, sir.

Mr. Bellows: May I be permitted to make an offer of proof outside of the presence of the jury?

The Court: In respect to that last question, you may.

* * *

Mr. Bellows: Your Honor, my offer of proof is as follows: I expect to show by cross examination and

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[10] Illinois Revised Statutes, 1967, Ch. 38, §16-1, incorporates all offenses involving the taking of the property of another, by whatever means may have been recognized previously (except "robbery" and "false pretenses"), into one statutory offense, "Theft."

it may be verified, if you choose to do so, if he denies the fact, that he was indicted in the month of February, 1966, for the crime of theft which is a felony; that the matter has been pending now over a year and that the reason for the extraordinary delay in bringing this matter to justice for a crime of theft—actually it was forgery, but under our new statute, your Honor, it is considered to be theft—is that he expects to get consideration, your Honor, from the court and the prosecution in Cook County for his cooperation with the government in this case and for his testimony in this case.

For that reason, your Honor, I think it is extremely important to show motive and reason for his testimony in this case.

The Court: What is the government's position in respect to the offer of proof of the defendant Amabile?

* * *

Mr. Lamendella: If this offer is being made, your Honor, to impeach the witness on the basis of an indictment, we object.

The Court: Do you object to the offer?

Mr. Lamendella: Yes, we do.

The Court: I sustain the objection.

Bring in the jury.

Mr. Bellows: May I add one more point, your Honor?

The Court: I have ruled on your offer. You can't add to an offer once it is made, sir.

Mr. Bellows: I want to explain the position of Lamendella to be inconsistent with my offer. He says he objects to the indictment. This is beyond the indictment.

The Court: He said he objected to the offer.

Mr. Bellows: Well, he said to the indictment.

The Court: You object to the offer of proof?

Mr. Lamendella. I do your Honor.

* * *

[By Mr. Bellows]

Q. Mr. Riley, are you presently under investigation by the Internal Revenue for evasion of taxes?

Mr. Lamendella: I will object to that, your Honor.

The Court: I sustain the objection.

Mr. Bellows: May I make another offer of proof?

The Court: Yes.

* * *

Mr. Bellows: My offer of proof, your Honor, is that Mr. Riley, the witness on the stand, is presently under investigation by the Internal Revenue; that he has two lawyers prominent in the tax field in criminal cases representing him, and that if he were cross examined, your Honor, he would admit, I am sure, that he knows that his financial affairs are under investigation by the Internal Revenue for failure to account for taxes and for the evasion of taxes, and that his books are in the hands of the Internal Revenue agents, and that he expects to get consideration, your Honor, from the government for his cooperation with them in this case and for his testimony in this case.

The Court: What is the position of the government in respect to the offer of proof of the defendant Amabile?

Mr. Lamendella: We object, your Honor.

The Court: I sustain the objection.

* * *

The majority held: 1) "Viewed in isolation, Amabile's efforts to explore Riley's motives for testifying in the Government's favor might be proper." 2) "* * * [A] defendant may normally show that a prosecution witness expects favorable treatment from the Government in return for his testimony." 3) "* * * [A] witness may not be impeached by showing that he has been arrested and indicted." 4) "In the present case, the District Judge was faced with a collision of these two principles. He was entitled to balance the conflicting interests * * * *" 5) Examination of Petitioner's entire cross-examination of Riley leads to the conclusion "that Amabile's references to the state indictment and federal tax investigation were designed to prejudice the jury against Riley through smear and innuendo rather than to impugn his veracity." And, alternatively, 6) "* * * that appellant's 'questions do not appear sufficiently likely to have developed evidence that would have significantly weakened the Government's case' by showing the witness' bias * * * [because] The United States Attorney does not control investigations being conducted by the Internal Revenue Service * * * [and] As to the state court criminal action, the United States Attorney was of course not empowered to accord any consideration." (App. A, *infra*, pp. App. 6-9)

Judge Swygert considered this restriction of cross-examination "an error which alone would require reversal * * * *" He did "not believe that a conflict between * * * evidentiary rules, such as the one the majority attempts to erect, exists." And, he concluded: "It is apparent from the record that the district judge perceived no 'collision' of the kind suggested by the majority. Moreover, any attempt to show the bias of a witness by evidence that he is under indictment or investigation would create the same 'collision.' Thus the rule enunciated by the majority might

preclude cross examination of this kind in every case, a result contrary to the general rule permitting such inquiry." (App. A, *infra,* pp. App. 16, 19, 21)

B. The Government's claim that the $48,500 second draw was obtained by extortion rested upon Riley's assertion that he was afraid of Amabile because of threats which Amabile and Palermo had previously made concerning his personal safety and that of his family.[11] On cross examination, the defense attempted to show that Riley had not mentioned certain specific threats to which he had testified

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[11] Including the threat described at page 7, *supra,* Riley told of four alleged threats by Amabile (or Amabile and Palermo) prior to January 1965. The first of these took place in April 1962, at Palermo's office. Palermo asked Riley about a proposed project in Northlake, Illinois, and Amabile told Riley he was "the man" in Northlake, Riley was not going to make a move there without his permission, and that would cost $70,000. At one of a number of subsequent meetings, when Riley said he did not have the $70,000, Palermo said he had the ability to stop one of Riley's projects in Addison, Illinois, and Amabile added there were ways people like Riley could be stopped. Subsequently, Riley paid Amabile $30,000. (II App. 540-41; 555; 557)

In June 1963, Amabile allegedly told Riley that he wanted the concession to install washers and dryers in Riley-built apartment buildings in Northlake. When Riley said he had given the concession to someone else, Amabile said "the man" wanted the business and he did not care what was done, "the man" had to have the business (II App. 559)

In September 1963, at a meeting with Palermo, Amabile allegedly told Riley to give Palermo the plumbing contract on a project in Westmont, Illinois, and in any other work they asked for; he added that otherwise he could put village officials in Northlake to work to stop construction there immediately. Riley objected to Palermo's work. Amabile then told Riley he was "nothing but a wise guy and he would handle [him] with a baseball bat if [he] didn't stop trying to be a wise guy." Riley asked to leave and Amabile said he could not. Palermo said he would "bury" Riley's construction superintendent and Amabile said he would hammer the nails in the coffin.

—that Amabile said he knew where Riley's mother lived (II App. 507-7, 565), that he said he knew where Riley's children went to school (II App. 506-7, 565), that he threatened to use a baseball bat on Riley (II App. 506-7, 564), and that Riley would need a cane from then on if Palermo did not receive certain plumbing contracts (II App. 506)—in statements which he had given Government Agents prior to trial. (III App. 683-85) Riley, in answer to an invitation to point out where, in one of his statements, he had told about these threats, answered that the disclosure was recorded on the second page of his October 5, 1965 statement, the first statement he had given. (III App. 684-85) Counsel for Petitioner was then refused in four attempts to find out exactly where, on the second page, this disclosure was to be found. (III App. 684-85) Finally, he attempted and formally offered to show that Riley failed to mention these specific threats in all five of his pre-trial statements, including the one made on October 5th. The court refused to allow questions concerning this to be asked. (III App. 685-87)

Amabile said he knew where Riley's mother lived and where his children went to school, and that Riley would need a "candy cane from then on out" if they did not receive the work. (II App. 563-65)

Evidence of these pre-conspiracy threats were received, ostensibly, to show the reasonableness of Riley's fear of Amabile in January 1965. Finding such relevance and that the "District Court carefully instructed the jury that this testimony was limited to that purpose (Tr. 2564)," the majority held Battaglia's assigned error (adopted by Petitioner) concerning the admission of this evidence without merit. (App. B, *infra* p. App. 37) Judge Swygert was "at a loss to find the 'careful instruction' referred to by the majority" and was of the opinion that the evidence of threats by Palermo, not even charged as an unindicted co-conspirator, was irrelevant for any purpose. (App. B, *infra,* p. App. 64) In Petitioner's appeal, he concluded that the admission of this evidence prejudiced Petitioner. (App. A, *infra,* p. App. 21)

IV. Refusal to order production of the Grand Jury minutes of the testimony of Government witnesses Riley, LaKey and DiVito and the subsequent adoption of a prospective rule regarding the production of such minutes by the Court of Appeals deprived Petitioner of fundamental rights.

Following the direct testimony of the witness Mike DiVito and after it had been ascertained that he had also testified before the Grand Jury, counsel moved for the production of the transcribed minutes of that testimony. (I App. 194-95) The trial judge inquired if the Government were willing to deliver up the minutes. The Assistant United States Attorney answered: "No, your Honor. We would gladly give the Court the copy for an in camera inspection." The court, ignoring this offer, immediately asked counsel "What authority you have * * * that would make it legal for me to compel the government to turn over a transcript of this witness' testimony before the grand jury?" (I App. 195) Counsel promised to return following the noon recess with authority.

During the afternoon session the following took place (I App. 233-34):

* * *

> The Court: All right.
>
> Now, Mr. Bellows, I sustained an objection to your motion that the government be required to produce for the examination of the defense lawyers the transcript of the testimony of this witness before the grand jury, and I am going to adhere to that ruling. I will save you all of the research that you were going to do during the luncheon recess. I call your attention to Rule 16 as amended of the Criminal Rules and it does provide, Mr. Bellows, that the recorded testimony of a defendant before a grand jury may be produced by

way of discovery and inspection. Moreover, in my opinion a transcript of a witness' testimony before a grand jury is not a statement within the meaning of Subsection (e) of Section 3500.

Mr. Walsh: Your Honor, may I join in Mr. Bellows' motion for the production of the grand jury minutes on behalf of Mr. Battaglia and I would urge as authority Dennis v. United States at the last term of the Supreme Court.

The Court: I will stand on my ruling. You may join and I deny your motion.

Mr. Bellows: Your Honor, may I ask that the grand jury testimony be sealed and impounded, your Honor, for whatever purposes we may need it?

The Court: I haven't any authority to do that. You may ask.

Mr. Bellows: I am asking.

The Court: And I deny your request.

Mr. Walsh: Can it be marked as an exhibit?

The Court: No, because I rule it is not properly here, if it were here, or if it is here.

* * *

Subsequently, following the testimony of LaKey (II App. 389-90) and Riley (III App. 688-89) the defense moved for the production of the grand jury minutes pertaining to each. The motions were denied.

Later events[12] disclosed that the minutes of Riley's testi-

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[12] During a subsequent trial of Amabile, Palermo and others, in which Riley again appeared as the principal Government witness, the same trial court, upon the authority of *Dennis* v. *United States*, 384 U.S. 855, ordered production of the grand jury minutes. These minutes—the same as those sought in the instant case—were certified to the Court of Appeals and were appended to Battaglia's petition for rehearing of his appeal. (See, App. A, *infra*, p. App. 10, n. 7)

mony before the Grand Jury, like his 3500 statements, did not contain references to the alleged threats of physical violence by Amabile and Palermo.

The majority held that Petitioner "did not show particularized need [for the minutes at the time of the request] and cannot now supply that requirement by hindsight." Further, the majority said: The offer by "the Assistant United States Attorney * * * to give a copy to the Court for an *in camera* inspection * * * was not accepted by defense counsel. If it had been accepted, the statements might have been turned over to them, so that any error in this connection was of defendant's own making." Finally, the Court ruled: "In *United States* v. *Youngblood*, 379 F.2d 365, 370 (2d Cir. 1967), the Court of Appeals for the Second Circuit promulgated a prospective rule giving the defense access as of right to a witness' grand jury testimony on the subjects about which he testified at the trial, unless the Government can show that access should be denied. At the oral argument of this appeal, the Government stated that it had no objection to such a prospective rule in this Circuit. We approve of the *Youngblood* procedure and adopt it with respect to trials commencing after this judgment is entered." (App. A, *infra*, pp. App. 11-12)

REASONS FOR GRANTING THE WRIT

1. A threat of extortion must have a reasonable causal relation to interstate commerce in order to violate the Hobbs Act.

When this Court last reviewed a Hobbs Act prosecution, it declared that the Act "speaks in broad language, manifesting a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery or physical violence." *Stirone* v. *United States*, 361 U.S. 212, 215. Nevertheless the Court cautioned, "The charge that interstate commerce is affected is critical since the Federal Government's jurisdiction of this crime rests only on that interference." (361 U.S. at 218) The present case tests the limits of the Hobbs Act and the manner in which commerce must be affected to meet that jurisdictional test and the intent of the statute. Practically speaking, the question here is whether every extortionate threat made to a person who operates a business engaged to any extent in interstate commerce comes within the ambit of the statute, or whether there must be a nexus between the threat itself and interstate commerce.[1]

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[1] Judge Swygert, dissenting, felt "that a threat to extort proscribed by the Hobbs Act must have a reasonable causal relation to interstate commerce. The likelihood of an obstruction to the flow of commerce must be the result of the threat." (App. A, *infra*, p. App. 14) Consequently, he viewed the majority's decision that "a depletion of reserves is all that is necessary to show the requisite affect on commerce," as having the potential of affording "a retail store owner, for example, * * * federal protection from extortion, regardless of the nature or the likely

In the most recent Seventh Circuit decision involving the Hobbs Act preceding this case, *United States* v. *Pranno*, 7th Cir. 1967, 385 F.2d 387, *cert. den.*, 88 S.Ct. 1028, the Court said (385 F.2d at 389):

> "Extortion by threat to disrupt a local activity the stoppage of which would in turn result in stoppage of interstate shipment of raw materials essential for that activity falls within the act. The statute seems to be read as not only prohibiting the obstruction of commerce by extortion, but also prohibiting extortion by any threat, the carrying out of which would obstruct commerce."

With that statement there is no dispute. But the carrying out of the threat in the present case would not have obstructed commerce; Riley might have been injured physically, but the business of Riley Management would have

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affect of the threat, simply because his stock of merchandise had in some measure moved in interstate commerce." He did not "believe that the Hobbs Act was intended to have such a broad reach." (App. A, *infra*, pp. App. 15-16) While this is precisely the point Petitioner attempted to make below, and the outlook which prompts the question here, the example posed by Judge Swygert does not go far enough. Under the rationale employed by the majority — *viz.* depletion of assets having an effect on purchasing power—extortion of anyone who purchases any of the million and one necessities of daily living which originate from without the state would be in violation of the act because a subsequent reaction to the threat—the payment of money—would deplete the victim's assets and reduce his purchasing power. And then too, because the Act also proscribes affecting commerce by robbery, the decision may be taken as opening the way for federal prosecution of the "hold-up" man merely because by his robbery he has reduced the purchasing power of his victim. This reasoning may reduce the problem to it most absurd terms, but on the other hand the decision of the majority does open wide this possibility of greatly expanded federal prosecution of essentially local crimes.

continued. There was no nexus between the threat and commerce.

As a consequence, because it undoubtedly realized this at trial, the Government urged that "the resources of the Riley Management Corporation were depleted by extortion * * * [and since] the business of the Riley Management Corporation depended on shipments of materials and supplies in commerce, * * * [it could be] infer[red] that the extortion in some way or degree did obstruct, delay or affect commerce." The trial judge accepted this view and instructed the jury accordingly. (III App. 972-73) On appeal, the Seventh Circuit abandoned the limit set by *Pranno,* accepted the Government's view, and found authority for so doing in *United States* v. *Provenzano,* 3rd Cir. 1964, 334 F.2d 678, *cert. den.,* 379 U.S. 947, in which the Third Circuit approved an instruction that the depletion or diminution of the resources of a business by "payments of money obtained by extortion [was likely to impair] the capacity to efficiently conduct such business * * * to the extent of the drain on its resources * * * *" (334 F.2d at 692)

Provenzano, like every other Hobbs Act case,[2] however,

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[2] See e.g., *Nick* v. *United States,* 8th Cir. 1941, 122 F.2d 660 (implied threat to disrupt victims' businesses by causing work stoppages if demands not met); *Hulahan* v. *United States,* 8th Cir. 1954, 214 F.2d 441 (freedom from labor problems guaranteed in return for payments, but intimation that same would not be true if demands not met); *United States* v. *Varlack,* 2nd Cir. 1955, 225 F.2d 665 (express threat to disrupt business if demands for payment of money not met). Compare, *Stirone* v. *United States,* 361 U.S. 212, 215 (charged threat to interfere with shipment of sand to victim, if demands for payment of money not met, within scope of the Act; whether "obstruction" of prospective steel shipments from steel mills being constructed with concrete supplied by victim "would be enough, alone, to bring this transaction under the Act is a more difficult question," not decided because of other error.)

concerned a threat to delay, obstruct or affect the victim's interstate (trucking) business by labor slow downs and similar disruptive acts if the extortionate demands were not met. (334 F.2d at 681-82, 687) But again, this was not so in the present case. As even the majority recognized (See, App. A, *infra*, pp. App. 3-4), Petitioner did not threaten to disrupt Riley's business. Moreover, insofar as that business was a principal source of income for him,[3] it was contrary to Petitioner's interests to disrupt the business. There was no connection between the threat and interstate commerce. It was only Riley's response to the threat, his payment of money, which can be said to have had an affect on commerce, and that by reason of the fact that the payment depleted his assets. Such a tenuous relation is indistinguishable from the affect on commerce generated by the robbery of the corner drug store which also purchases its wares in interstate commerce.

One other Circuit has considered an aspect of this issue. In *United States* v. *Critchley*, 3rd Cir. 1965, 353 F.2d 358, an union business agent was charged with obstructing, etc., interstate commerce by extorting from the Associated Roofing Contractors of New Jersey a payment of $4,000, "induced by the wrongful use of economic and financial injury to the businesses of the members" of that organization and by threatened labor disputes, work stoppages and other

[3] Under its contract with Riley Management, Carlson was entitled to a third draw upon completion of its work. (I App. 270). Consequently, there was evidence that, even after the second draw Amabile attempted to maintain Evans' status with Riley Management in order to insure continued performance of the contract. Thus, he recalled LaKey from Florida and complained to him that his failure to pay Carlson's bills had gotten Amabile in trouble with Riley, had gotten Riley in trouble, and was jeopardizing Evans' position with Riley. (II App. 361-63)

interruptions in connection with their business operations. (353 F.2d at 360-61) The Government failed to prove that the defendant had threatened labor disputes, work stoppages and other interruptions. It did prove that the defendant had solicited a bribe, first not to make, and then to withdraw, a complaint against one of the representatives of the association concerning his failure to meet certain contract specifications in connection with the construction of public housing. The defendant also threatened that "'if he did not get the money then one by one, dead, he would ruin the roofers.'' (353 F.2d at 359) The Third Circuit examined the element considered important here—depletion of assets. It observed that this Court has held "there are two essential elements of a Hobbs Act crime; interference with commerce, and extortion'' (*Stirone* v. *United States*, 361 U.S. 212, 218), and concluded that "Assuming that the defendant's solicitation and extraction of the $4,000 payment was extortion and not merely a 'bribe' there is here absent proof of the element of 'interference with commerce.' '' (353 F.2d at 361) The Court ruled: "The making or the pressing of the complaint * * * would not in any respect have obstructed, delayed or affected commerce or any article in commerce * * * nor would the initiation and pressing of complaints against other members of Associated, have done so.'' (353 F.2d at 361) To the extent then that the Third Circuit views the Hobbs Act as proscribing only threats, "the carrying out of which would obstruct commerce'' (*United States* v. *Pranno*, 7th Cir. 1967, 385 F.2d 387, 389), it may be considered to be in harmony with former decisions of the Seventh Circuit, but in conflict with the latest decision of that Circuit as expressed in the present case.

It is important that the Court review this case to determine the limits of the Hobbs Act and resolve the apparent

conflict between the Third and the Seventh Circuits as to what those limits are. In this era, the decision of the Seventh Circuit in the present case fairly well emasculates the critical difference between the essentially local offenses of extortion and robbery and the peculiarly federal offense described by the Hobbs Act, interference with interstate commerce. See, *Stirone* v. *United States*, 361 F.2d 212, 218; *United States* v. *Stirone*, 3rd Cir. 1958, 262 F.2d 571, 578, 579 (dissenting opinion). Review of this case is necessary to re-establish that critical difference.

II. There was no proof that Petitioner conspired to extort money from Riley or the Riley Management Company.

The decision below rests upon two related propositions which together, or separately, represent an attempt to enlarge the permissible scope of conspiracy prosecutions. It is necessary to review these propositions by which the majority was able to conclude that both Evans and Battaglia[1] conspired with Petitioner to commit the peculiarly federal offense of obstructing interstate commerce by a threat of extortion in order to carry out this Court's warn-

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[1] Neither majority nor dissent voiced an opinion as to whether Pranno was a party to the charged conspiracy. Judge Swygert assumed he was not. (See, App. A, *infra*, p. App. 13) In view of the abundance of evidence of the friction and "back-biting" between Petitioner and Pranno, both before and after the threat (see Statement, *supra*, pp. 18-21), the evidence that the two were antagonists rather than partners, even in the scheme to defraud as it eventually turned out (see Statement, *supra*, p. 19), and the lack of any evidence that Pranno knew, or had cause to know, of the threat to Riley, this assumption was well founded. If then Evans and Battaglia were not parties to the charged conspiracy, Petitioner could not be convicted of conspiracy. *Hartzel* v. *United States*, 322 U.S. 680.

ing that it would "view with disfavor attempts to broaden the already pervasive and widesweeping nets of conspiracy prosecutions." *Grunewald* v. *United States*, 353 U.S. 391, 404.[2]

The evidence showed that Petitioner, Evans, Pranno, DiVito and LaKey originally entered into an agreement to obtain money from the Riley Management Company by fraud and deceit. So much has been conceded by both the majority and dissent below. (App. B, *infra*, pp. App. 30-32; 55, 57, 62) We may assume *arguendo* that, by his conduct in February (or March) 1965, Battaglia was part of this agreement. At this point, however, the opinions diverge, and this divergence is representative of a doctrinal difference concerning the scope of conspiracy prosecutions which should be resolved by this Court.

The majority concludes that "On this record, it is obvious that Evans knew of Riley's fear of Amabile * * * [and it] would be unreasonable to suppose that Evans would be so closely associated with Amabile *in the scheme to defraud* without realizing that Amabile would * * *" employ coercive means. (App. A, *infra*, pp. App. 30-31; emphasis added.) But this proposition, as stated, is in conflict with the admonitions by the Court against basing guilt on evidence of association (*Krulewitch* v. *United States*, 336 U.S. 440, 454, concurring opinion)[3] or ar-

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[2] See also *Krulewitch* v. *United States*, 336 U.S. 440; *Lutwak* v. *United States*, 344 U.S. 604; *Delli Paoli* v. *United States*, 352 U.S. 232; *Bollenbach* v. *United States*, 326 U.S. 607; *United States* v. *Bufalino*, 2nd Cir. 1960, 285 F.2d 408.

[3] See also, *United States* v. *Falcone*, 2nd Cir. 1940, 109 F.2d 579, aff'd, 311 U.S. 205; *Carbo* v. *United States*, 9th Cir. 1963, 314 F.2d 718; *United States* v. *Borelli*, 2nd Cir. 1964, 336 F.2d 376.

riving at judgments of guilt by piling inference upon inference. *Ingram* v. *United States*, 360 U.S. 672.[4] Evans did not know of the threats. His only participation was in a scheme to defraud, the antithesis of extortion. There was evidence, moreover, that Amabile's role was to be kept secret from Riley (see Statement, *supra*, pp. 11-13), so that Evans could hardly expect or foresee the direct confrontation of Riley by Amabile that is indicative of extortion.

As to Battaglia, the majority finds that he "had 'embarked on a criminal venture of indefinite outline' and therefore, had to 'take his chances' as to the methods used by the other co-conspirators." (App. B, *infra*, p. App. 32) This broad proposition is in conflict with decisions of the Second Circuit that joint venturers take their chances as to the methods used by their associates only if those methods fall within the common purposes of the venture as all understand it. See, *United States* v. *Andolschek*, 2nd Cir. 1944, 142 F.2d 503, 507. *United States* v. *Peoni*, 2nd Cir. 1938, 100 F.2d 401, 403; *United States* v. *Crimmins*, 2nd Cir. 1941, 123 F.2d 271, 273. In *Crimmins*, Judge Hand highlighted the extent of the controversy here when he pointed out that "It is never permissible to enlarge the scope of the conspiracy itself by proving that some of the conspirators, unknown to the rest, have done what was beyond the reasonable intendment of the common understanding." (123 F.2d at 273) And in this context he was only repeating what he had said in *Peoni*: "At times it seemed to be supposed that, once some kind of criminal concert is established, all parties are liable for everything

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[4] See also, *United States* v. *Ross*, 92 U.S. 281; *Pereira* v. *United States*, 347 U.S. 1, 15-16 (dissenting opinion). Compare, *Bollenbach* v. *United States*, 326 U.S. 607; *Tot* v. *United States*, 319 U.S. 463, 467-68.

anyone of the original participants does, and even for what those do who join later. Nothing could be more untrue. Nobody is liable in conspiracy except for the fair import of the concerted purpose or agreement as he understands it; * * *'' (100 F.2d at 403).

This ''chance-taking'' proposition is also in conflict with decisions in the Sixth (*United States* v. *Barnes,* 1968, 383 F.2d 287) and Ninth (*Twitchell* v. *United States,* 1963, 313 F.2d 425) Circuits. Both Circuits have rejected the sprawling doctrine that partners in one criminal venture are criminally responsible for other criminal conduct of a copartner ''even though such criminal conduct was not shown to be necessary or usual to the partnership or known to the copartners.'' *United States* v. *Barnes,* 6th Cir. 1968, 383 F. 2d 287, 292. *Barnes* explains: ''We are not dealing with a civil rule which holds generally that all partners are bound by the acts of any copartners done within the apparent scope of authority to serve partnership purposes. It might aid the financial success of an illegal * * * enterprise for a managing partner * * * [to commit some other crime]; but we do not believe that all copartners could be prosecuted for such crimes if they had no knowledge of them, and had not conspired to bring them about, even though their commission may have served, but was no part of, the objectives of or the motivation for the admittedly illegal partnership enterprise.'' (383 F.2d at 292)

These limits imposed by the Second, Sixth and Ninth Circuits serve to curtail any tendencies to ''broaden the already pervasive wide-sweeping nets of conspiracy prosecutions.'' The decision in this case does not recognize any limits; it encourages pervasiveness. The Court should grant its writ to resolve this fundamental difference and to consider this important question concerning limits on the scope of conspiracy prosecutions.

III. Refusal to permit Petitioner to inquire on cross examination a) into facts showing motive of William Riley for testifying and the consideration he received therefore, and b) regarding his failure to mention previous threats of physical violence by Petitioner and another in prior statements given to Government Agents, deprived Petitioner of the right of cross examination guaranteed by the Sixth Amendment.

In *Pointer* v. *Texas,* 380 U.S. 400, this Court affirmed that the right of cross examination was firmly imbedded in the Sixth Amendment. See also, *Alford* v. *United States,* 282 U.S. 687; *Smith* v. *Illinois,* 390 U.S. 129; *Heard* v. *United States,* 8th Cir. 1919, 255 Fed. 829. Compare, *Jencks* v. *United States,* 353 U.S.657; *Gordon* v. *United States,* 344 U.S. 414. Although recognizing this right in the abstract, the Seventh Circuit has announced new principles in the present case which promise to severely curtail this "essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." *Pointer* v. *Texas,* 380 U.S. 400, 405. Examination of these new principles ought to be undertaken to resolve the conflicts they entail and to settle questions of paramount importance that cannot help but occur in a vast number of criminal trials.

A. Recognizing that Petitioner had a right to explore Riley's motives for testifying in the Government's favor,[1] the majority, nevertheless, employed a variety of arguments for denying Petitioner that right in the present

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[1] *United States* v. *Masino,* 2nd Cir. 1960, 275 F.2d 129; *Wheeler* v. *United States,* 1st Cir. 1965, 351 F.2d 946; *Harris* v. *United States,* 9th Cir. 1967, 371 F.2d 365; see also, McCormick, *Handbook of the Law of Evidence,* § 40, pp. 82-4 (1954 ed.). Compare, *Napue* v. *Illinois,* 360 U.S. 264, 269.

case. Thus it found in the established rule that a witness may not be impeached by a showing that he has been arrested and indicted, a basis for deciding that the right of cross examination and the rule represent "conflicting interests" which the trial judge was entitled to balance.[2] (App. A, *infra*, p. App. 6) Judge Swygert's dissent, however, points out the novelty of this theory of "conflicting interests" and suggests that it may be employed to defeat entirely the heretofore acknowledged right of a defendant to show that a witness against him expects to obtain leniency for his own problems in return for his testimony. (App. A, *infra*, pp. App. 19-21) So significant has this right been considered before, that a false answer con-

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[2] In arriving at this decision, the majority attempted to divine counsel's motives in asking Riley whether he was under indictment for theft in the state courts and whether he was under investigation by the Internal Revenue Service for income tax evasion. To do this it looked at Riley's subsequent cross examination, culled seven questions "so obviously improper that there has been no attempt on appeal to justify them" (App. A, *infra*, p. App. 7) from the record of counsel's 173 page cross examination (II App. 615-56; III App. 657-90), and concluded that the purpose of the restricted cross examination was "designed to prejudice the jury against Riley through smear and innuendo rather than to impugn his veracity" (App. A, *infra*, p. App. 8), despite counsel's explicit offer of proof to the contrary (See, Statement, *supra*, pp. 24-26), and the failure of the trial judge to so find. Moreover, the fact that evidence may have an undesirable incidental secondary effect has never been regarded as a firm basis for its rejection (see, *Fairbanks* v. *United States*, D.C. Cir. 1955, 226 F.2d 251, 253), especially in view of the availability of cautionary instructions to the jury. Yet even this is overshadowed by the fact that, taken in context, many of the so-called improper questions were designed to show either the association between Riley and Amabile or that Riley Management was not made unpecunious by the payment of the second draw, but rather by Riley's own mismanagement.

cerning the witness' expected reward is cause enough to reverse the judgment. *Napue* v. *Illinois,* 360 U.S. 264.

A second argument used to defeat Petitioner's right to show Riley's motive for testifying was based on the view that the United States Attorney's Office is powerless to influence state criminal prosecutions and the investigations of the internal revenue service. (App. A, *infra,* pp. App. 8-9) Not only does this argument avoid practicality, but it conflicts with the decision of the Second Circuit in *United States* v. *Masino,* 2nd Cir. 1960, 275 F.2d 129, where the United States Attorney actually had interceded with the local authorities. If this argument is given acceptance, then all such "intercessions" will occur after the witness testifies rather than before, a state of affairs which would satisfy a sort of rubric, but which would do little to diminish the fact that consideration was still being promised in return for testimony. Compare, *Gordon* v. *United States,* 344 U.S. 414 (leniency not extended before testimony, but witness warned not to expect it unless he cooperated with government in prosecution of defendant).

B. To prove that Riley was not telling the truth when he testified that he had told investigating agents in his pre-trial statements about specific physical threats made by Amabile and Palermo in 1962 and 1963 and that proof of such disclosure was contained in his October 5, 1965, statement, the opinion below says, in effect, Petitioner should have introduced the statements and called the agents as his witnesses. (App. A, *infra,* p. App. 5; App. B, *infra,* pp. App. 40-41) This alone is not unusual. Certainly, had Petitioner wanted to call witnesses and introduce documents he would have had that right. Compare, *Gordon* v. *United States,* 344 U.S. 414, 420-21. But Petitioner could not be compelled to call witnesses or introduce documents, nor should he have been deprived of the right

to require Riley, on cross examination, to answer whether the matters to which he had testified could be found in any one of his five pre-trial statements, and to further require him, upon receiving an answer that it did appear in one, to identify the portion thereof that he felt contained the questioned material. Petitioner offered to prove by cross examination that the material was not in any statement. The right of cross examination is not exchangeable for the opportunity to call witnesses and introduce documents.[3] Prior decisions of this Court and others have recognized that to bring out facts tending to discredit the witness by showing that his testimony in

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[3] In arriving at the conclusion that it was, the decision below has misinterpreted the record and misapprehended several factors. First, the opinion states that Riley had not read the statements. (App. A, *infra*, p. App. 5) He had; he was given them to read during his grand jury appearance. (III App. 704) Second, the opinion states that Riley had no way of knowing whether the FBI had transcribed his complaints of physical threats. (App. A, *infra*, p. App. 5) He had. Not only had he read the statements, but he was given them during the cross examination and asked to point out where the complaints appeared. He said they were transcribed on the second page of the October 5, 1965, statement. He was then asked to point to the portion of that page which he felt contained reference to specific physical threats. The court would not permit this. (See, Statement, *supra*, p. 29) Third, the reference to *United States* v. *Borelli*, 2nd Cir. 1964, 336 F.2d 376, 391, is inapposite for there the witness had *denied* making certain statements to the FBI. Here, Riley affirmed making the complaints, and said they were in the statement before he was asked where they could be found. Fourth, the opinion states that Petitioner should have called witnesses to impeach Riley's testimony that the material was contained in the statements. But the court would not permit counsel to ask Riley if he had made the complaints in the succeeding four statements and thus Petitioner was unable to lay a foundation for calling impeaching witnesses. See, *Smith* v. *United States*, 6th Cir. 1960, 283 F.2d 16; *Williamson* v. *United States*, 9th Cir. 1962, 310 F.2d 192.

chief was untrue is a right of cross examination. *Alford* v. *United States,* 282 U.S. 687, 692; *Heard* v. *United States,* 8th Cir. 1919, 255 Fed. 829, 832. "The omission from * * * reports [given to government agents] of facts related at the trial * * * are also relevant to the cross-examining process of testing the credibility of a witness' trial testimony." *Jencks* v. *United States,* 353 U.S. 657, 667; see also, *Clancy* v. *United States,* 365 U.S. 312, 316.

Certiorari should be granted to review whether a defendant may be made to substitute the presentation of evidence of his own for effective cross examination of Government witnesses.

IV. Refusal to order production of the Grand Jury minutes of the testimony of Government witnesses Riley, LaKey and DiVito and the subsequent adoption of a prospective rule regarding the production of such minutes by the Court of Appeals deprived Petitioner of fundamental rights.

Two reasons were given by the Court of Appeals for its conclusion that denial of Petitioner's motion for the production of grand jury minutes was not erroneous: 1) Petitioner "did not show particularized need and cannot now supply that requirement by hindsight."; and 2) "* * * any error in this connection was of defendant's own making" by virtue of his not accepting an offer of the Assistant United States Attorney to turn the minutes over to the trial court for an *in camera* inspection. (App. A, *infra,* p. App. 11) Nevertheless, that Court has recognized the force of the arguments in favor of disclosure and adopted a rule, prospectively, granting disclosure as a matter of right.

The assertion that Petitioner "made his own error" is not supported by the record and should not impede this Court's review of the right of defendants to obtain grand jury minutes and the propriety of granting that right but limiting it prospectively. Although Petitioner did not accept the Government's offer to allow the trial judge to examine the minutes *in camera,* he was not extended an opportunity to do so. Immediately after the Government made the offer, the trial court asked counsel for Petitioner the basis of his request. Directing himself to the court's inquiry rather than the Government's offer, counsel promised to provide authority following the noon recess. (I App. 195) At that time, however, without hearing from counsel, the court denied his request. Subsequent citation of *Dennis* v. *United States,* 384 U.S. 855, proved to no avail. Then, when counsel asked that the minutes be impounded and sealed, the court denied that request on the ground that he lacked power to order the Government to disgorge the minutes for any purpose. Attention was never directed to the Government's offer, and the Government did not venture to re-offer the minutes after having secured a ruling that the trial court felt powerless to compel disclosure or delivery. (See, Statement, *supra,* pp. 30-31) Under these circumstances it cannot be said that Petitioner made his own error in connection with this matter. The question of whether delivery should have been ordered under the circumstances and whether a procedure requiring delivery can be limited prospectively must still be considered.

Inferentially, at least, the opinion indicates that Petitioner has made a sufficient *a posteriori* showing of a particularized need. Not only were DiVito, LaKey and Riley the three principal witnesses against Petitioner, but, in the main, their testimony concerned numerous con-

versations with Petitioner or his co-defendants. Much of this testimony was uncorroborated, particularly that of Riley concerning the various threats allegedly made by Amabile and Palermo. "Where the question of guilt or innocence may turn on exactly what was said, the defense is clearly entitled to all relevant aid which is reasonably available to ascertain the precise substance of the statements." *Dennis* v. *United States,* 384 U.S. 855, 872. In this case, moreover, Riley's 3500 statements indicated a glaring discrepency between his pre-trial statements and his testimony relating to various pre-conspiracy threats allegedly made in 1962 and 1963 by Amabile and Palermo. (See, Statement, *supra,* p. 29) Thus, insofar as Riley at least was concerned, the need to use the transcript to impeach him, to refresh his recollection, to test his credibility were all particularized needs. *Dennis* v. *United States,* 384 U.S. 855, 870, citing *United States* v. *Procter & Gamble Co.,* 356 U.S. 677, 683.

But while the Seventh Circuit has rejected Petitioner's claim based upon the denial of the grand jury minutes to him, it has avoided coming into conflict with the other circuits[1] by adopting, prospectively, the procedure promulgated in *United States* v. *Youngblood,* 2nd Cir. 1967, 379 F. 2d 365. Henceforth, the Court held, defendants will be permitted "access as of right to a witness' grand jury testimony on the subjects about which he testified at the trial, unless the Government can show that access should be denied." (App. A, *infra,* p. App. 12.) The procedure employed by the Court does not comport, however, with the

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[1] See, *Schlinsky* v. *United States,* 1st Cir. 1967, 379 F.2d 735; *Cargill* v. *United States,* 10th Cir. 1967, 381 F.2d 849; *Worthy* v. *United States,* D.C. Cir. 1967, 383 F.2d 524.

criteria for such a prospective rule set forth by this Court in *Johnson* v. *New Jersey*, 384 U.S. 719; *Linkletter* v. *Walker*, 381 U.S. 618 and *Tehan* v. *United States ex rel Shott*, 382 U.S. 406.

Disclosure of grand jury minutes affects "the very integrity of the fact-finding process" and averts "the clear danger of convicting the innocent." See, *Johnson* v. *New Jersey*, 384 U.S. at 727-28; *Linkletter* v. *Walker*, 381 U.S. at 639; *Tehan* v. *United States ex rel. Shott*, 382 U.S. at 416. This is clear, of course, because the minutes are used "to impeach a witness, to refresh his recollection [and] to test his credibility," (*Dennis* v. *United States*, 384 U.S. 855, 870, citing, *United States* v. *Procter & Gamble Co.*, 356 U.S. 677, 683) matters which are the very essence of the fact finding process and are universally recognized as the principal method for preventing the conviction of the innocent. See, *Pointer* v. *Texas*, 380 U.S. 400, 404; *Alford* v. *United States*, 282 U.S. 687, 692.

This question of general importance, whether procedures to compel the disclosure of grand jury minutes as a matter of right can be limited to prospective cases, should be decided by the Court.

CONCLUSION

For the foregoing reasons, as well as for those advanced by Petitioners Dave Evans and Salvatore Battaglia, Petitioner respectfully submits that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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On the Brief

APPENDIX

APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

SEPTEMBER TERM, 1967 — JANUARY SESSION, 1968

No. 16314
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
JOSEPH AMABILE,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

April 26, 1968

Before SCHNACKENBERG, SWYGERT and CUMMINGS, *Circuit Judges.*

CUMMINGS, *Circuit Judge.* This appeal is to review Joseph Amabile's conviction for conspiring with Salvatore Battaglia, Dave Evans and non-defendant Rocco Pranno to violate the Hobbs Act (18 U.S.C. § 1951). The gravamen of the charge was that in January 1965, the conspirators obtained $48,500 from the Riley Management Corporation through threats of bodily harm to its president and economic harm to both. Battaglia's and Evans' convictions were affirmed in ..... F.2d ..... (7th Cir. 1968).

Amabile first argues that the Government failed to prove that he conspired to obtain money from Riley Management Corporation by extortion. A like argument was advanced by Battaglia and Evans and rejected in their appeals. For the reasons stated in the prior opinion, the evidence was sufficient to support Amabile's conspiracy conviction. See ..... F.2d at pp. .....

Amabile's next point is that his "extortionate threat made against a man [William Riley, president of the Riley Management Corporation] whose business touches interstate commerce" does not violate the Hobbs Act because the threat was only indirectly and remotely connected with interstate commerce. We disposed of this issue in the opinion dealing with Amabile's co-defendants. See ..... F.2d at p. ..... However, since Amabile presses the issue to considerable extent, further discussion may be warranted.

The Hobbs Act "speaks in broad language, manifesting a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery or physical violence." *Stirone* v. *United States,* 361 U.S. 212, 215. As to the commerce power, the Supreme Court has recently stated in *Katzenbach* v. *McClung,* 379 U.S. 294, 305:

> "The power of Congress in this [commerce] field is broad and sweeping; where it keeps within its sphere and violates no express constitutional limitation it has been the rule of this Court, going back almost to the founding days of the Republic, not to interfere."

Since Congress has used all its "broad and sweeping" commerce power in enacting the Hobbs Act, the courts have rightly attributed great scope to the statute. Thus

in language applicable here, Judge Sanborn stated as follows in *Hulahan* v. *United States,* 214 F.2d 441, 445 (8th Cir. 1954), certiorari denied, 348 U.S. 856:[1]

> "It seems apparent from the language of the statute that it was the intent of Congress to protect interstate commerce against extortion or attempted extortion which in any way or *in any degree* reasonably could be regarded as affecting such commerce. The exaction of tribute from contractors engaged in local construction work who are dependent upon interstate commerce for materials, equipment and supplies, or who are engaged in constructing facilities to serve such commerce, is, in our opinion, proscribed by [the Hobbs Act]." (Emphasis supplied)[2]

As in *Hulahan,* Amabile was exacting tribute from a builder "dependent upon interstate commerce for materials, equipment and supplies" and was therefore within the reach of the Hobbs Act. It is unnecessary that the extortion have as substantial an effect on interstate commerce as a combination in restraint of trade. *United States* v. *Malinsky,* 19 F.R.D. 426, 428 (S.D. N.Y. 1956).

As pointed out in our prior opinion, the $48,500 payment made pursuant to Amabile's threats depleted Riley Management Corporation's reserves. Depletion is pertinent in considering commerce under the Hobbs Act. Thus

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[1] Recent instances where this Court has affirmed Hobbs Act convictions in cases involving construction projects are *United States* v. *Kramer,* 355 F.2d 891 (7th Cir. 1966), certiorari denied (except on an irrelevant point) 384 U.S. 100, and *United States* v. *Sopher,* 362 F.2d 523 (7th Cir. 1966), certiorari denied, 385 U.S. 928.

[2] The *Hulahan* case has been followed by this Court at least twice: *United States* v. *Floyd,* 228 F.2d 913, 916, 918-919 (7th Cir. 1956), ceriorari denied, 351 U.S. 938; *United States* v. *Green,* 246 F.2d 155, 160 (7th Cir. 1957), certiorari denied, 355 U.S. 871.

in *United States* v. *Provenzano*, 334 F.2d 678, 692 (3d Cir. 1964), certiorari denied, 379 U.S. 947, a Hobbs Act commerce instruction was approved with stated in part:

> "Where the resources of a business are depleted or diminished in any manner or degree by payments of money obtained by extortion the capacity to efficiently conduct such business is to the extent of the drain on its resources likely to be impaired."

The Hobbs Act does not require that the threats to Riley and his family be directly aimed at interstate commerce. In the statute Congress defined extortion as obtaining property through "actual or threatened force, violence, or fear" (18 U.S.C. § 1951(b)(2)). There is no requirement that the extortion be directed at interstate commerce as long as the extortion "in any way or degree obstructs, delays, or affects commerce" (18 U.S.C. § 1951(a)). To accept appellant's construction would mean that Congress had exempted the most efficacious of threats. Certainly Congress did not intend such an anomalous result.

Like his co-defendants, Amabile asserts that the District Court unduly restricted cross-examination. He first asserts that he was not permitted to undermine Riley's testimony that the Lansing, Illinois, building project was meant to be kept a secret from Amabile and Palermo. As we pointed out in our earlier opinion, "Evans' counsel was permitted to elicit that the Riley company had prepared a brochure to promote sales of the Lansing apartments, and that the Hammond *Times* published a story about the project in August, 1964." ..... F.2d ..... In addition Battaglia's counsel was permitted to cross-examine Riley, without objection, about advertising for the Lansing project, selling units therein before construction, and

taking salesmen to Las Vegas to promote this project. It is clear that Amabile was given sufficient latitude to rebut the secrecy of the Lansing project.

Amabile also complains of the District Court's refusal to let his counsel ask Riley about the contents of five statements he had given to the Federal Bureau of Investigation, made available to defense counsel under the Jencks Act (18 U.S.C. § 3500). Riley had already testified that he advised the FBI of the 1962-1963 threats of Palermo and Amabile and that he had not read the statements. He of course had no way of knowing whether his complaints of the physical threats of Amabile and Palermo had been transcribed by the FBI in those statements. Amabile's counsel made no attempt to introduce the statements, so that they are not in the record. If the FBI statements were actually devoid of any reference to the Amabile-Palermo threats, Amabile's counsel should have called the recording FBI agents in order to lay a proper foundation for the admission of the five statements to impeach Riley. As Judge Friendly ruled in *United States* v. *Borelli*, 336 F.2d 376, 391 (2d Cir. 1964), certiorari denied, 379 U.S. 960:

> "when the witness is confronted with what appears to be an inconsistency, he may deny having made the contradictory statement to the agent and counsel's only recourse would be to call the agent and endeavor to have him prove the contrary."

See also 3 Wigmore on Evidence (3d ed.) § 1025.

Amabile repeats another argument offered by his co-defendants in their appeals, namely, that he was not permitted to show that Riley expected consideration in a state court theft indictment and in a federal tax investigation in return for his testimony herein. We rejected

this argument in the prior appeal in the last paragraph of our discussion under "Restriction of Cross-examination and Refusal to Admit Defense Exhibits" (..... F.2d at p. .....). The elaboration of this subject in Amabile's briefs calls for a more detailed discussion.

Of course, a defendant may normally show that a prosecution witness expects favorable treatment from the Government in return for his testimony. 3 Wigmore on Evidence (3d ed.) § 967. It is also well settled that the credibility of a witness may not be impeached by showing that he has been arrested and indicted. *Michelson* v. *United States,* 335 U.S. 469, 482; *United States* v. *Bolden,* 355 F.2d 453, 457 (7th Cir. 1965), certiorari denied, 384 U.S. 1012; Wigmore, *op cit.,* § 980a. This principle applies *a fortiori* to a federal tax investigation that has not resulted in charges being brought against the witness. In the present case, the District Judge was faced with a collision of these two principles. He was entitled to balance the conflicting interests and therefore did not abuse his discretion in keeping Riley's theft indictment and federal tax investigation from the jury.

Viewed in isolation, Amabile's effort to explore Riley's motives for testifying in the Government's favor might be proper. But we must heed the counsel proffered in *Johnson* v. *United States,* 318 U.S. 189, 202 (concurring opinion):

> "In reviewing criminal cases, it is particularly important for appellant courts to re-live the whole trial imaginatively and not to extract from episodes in isolation abstract questions of evidence and procedure. To turn a criminal appeal into a quest for error no more promotes the ends of justice than to acquiesce in low standards of criminal prosecution."

Applying this counsel, Amabile's entire cross-examination of Riley has been scrutinized.

Riley was subjected to a lengthy cross-examination, and Amabile's attempts to go into the state court indictment and tax investigation occurred very early. Thereafter, on at least seven occasions, Riley was asked questions implying that he was an unsavory character and financially irresponsible.[3] Counsel for Amabile then again sought to return to the state court proceedings against Riley. The series of intervening questions was so obviously improper that there has been no attempt on appeal to justify them. Considering the impropriety of

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[3] Seven such occasions are as follows:

"Q. Weren't you arrested while you were drunk for exposing yourself?"

* * *

"Q. Did you ever get into a fight with a young man at the El Morrocco Club because you were so drunk?"

* * *

"Q. As a matter of fact, isn't it true in order to get that loan you bribed one of the officers [of the savings and loan association]?

"A. No, sir.

"Q. And you paid him $25,000.?"

* * *

"Q. Did you know it was an offense against the laws of the United States to bribe an official of a loan association for the purpose of obtaining a loan?"

* * *

"Q. Weren't you sued by Margaret Gillespie for fraud?"

* * *

"Q. As a matter of fact, you were broke at that time."

* * *

"Q. * * * did you sign a check to a payee by the name of Bona for $23,000 which came back 'NSF'?"

the entire inquiry, it is patent that Amabile's references to the state indictment and federal tax investigation were designed to prejudice the jury against Riley through smear and innuendo rather than to impugn his veracity. Cf. *United States* v. *Pennix,* 313 F.2d 524, 528-530 (4th Cir. 1963).

The District Court's rulings are also supportable on the ground that appellant's "questions do not appear sufficiently likely to have developed evidence that would have significantly weakened the Government's case" by showing the witness'. bias. *United States* v. *Jones,* 360 F.2d 92, 96 (2d Cir. 1966), certiorari denied, 385 U.S. 1012. The United States Attorney does not control investigations being conducted by the Internal Revenue Service. Such investigations are common and usually involve no threat of an indictment. As to the state court criminal action, the United States Attorney was of course not empowered to accord any consideration. On this record, the District Court could properly conclude that the questions were speculative, unrelated to the charges against the defendant and not of sufficient probative value to show bias. *District of Columbia* v. *Clawans,* 300 U.S. 617, 632;[4] *Lott* v. *United States,* 230 F.2d 915, 918 (5th Cir. 1956), certiorari denied, 351 U.S. 953; *Leary* v. *United States,* 383 F.2d 851, 868 (5th Cir. 1967); *United States* v.

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[4] In *Clawans,* the reversal of the District Court was affirmed, but the Court observed (300 U.S. at p. 632):

> "The extent of cross-examination rests in the sound discretion of the trial judge. Reasonable restriction of undue cross-examination, and the more rigorous exclusion of questions irrelevant to the substantial issues of the case, *and of slight bearing on the bias and credibility of the witnesses,* are not reversible errors." (Emphasis supplied)

Higgins, 362 F.2d 462 (7th Cir. 1966), certiorari denied, 385 U.S. 945, *Abeyta* v. *United States*, 368 F.2d 544 (10th Cir. 1966).[5]

Because the United States Attorney was not empowered to influence the course of the state theft case or the tax investigation, and because the questions, in the light of other improper questions as to Riley during his cross-examination, were part of a smear campaign, we cannot say that the District Court abused its discretion in its rulings concerning these two subjects.

Amabile claims that his counsel was given insufficient time to read a 6-page statement that witness Henry LaKey had given to the FBI.[6] This statement was delivered to defense counsel under the Jencks Act at 10 A.M. on April 21, 1967. He had sufficient opportunity to read it from then until 2 P.M., when the usual noon recess ended and the cross-examination of LaKey began. There

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[5] Amabile has cited no case holding that it is reversible error to refuse to allow a defendant to show that a prosecution witness is biased because he expects favorable treatment on a pending indictment in another jurisdiction or in a tax investigation. In *United States* v. *Masino*, 275 F.2d 129 (2d Cir. 1960), favorable treatment had actually been accorded to the witness, and in *Gordon* v. *United States*, 344 U.S. 414, the trial judge warned the witness awaiting sentence on a guilty plea that leniency depended upon cooperation with the government. *Wheeler* v. *United States*, 351 F.2d 946 (1st Cir. 1965), and *Harris* v. *United States*, 371 F.2d 365 (9th Cir. 1967), are distinguishable because they involved direct financial benefits to the witness.

[6] This statement is part of the record on appeal and took us and Government counsel less than 11 minutes to read. The District Court was able to digest and rule on ten such statements by witness Riley during the April 27th luncheon recess.

has been no showing that his cross-examination of LaKey would otherwise have been different if more time had been allowed for study of LaKey's statement. Co-defendants' counsel did not even raise the point on appeal. In the absence of a showing of prejudice, the District Court did not abuse its discretion by allowing only such time as is "reasonably required for the examination of such statement" (18 U.S.C. § 3500 (c)).

Battaglia contended on his appeal that the Government should have granted his request for production of Mike DiVito's grand jury testimony. We held that production was unnecessary. See ..... F.2d ..... In addition to DiVito's grand jury testimony, Amabile insists that he was entitled to the minutes of the grand jury testimony of witnesses Henry LaKey and William Riley.[7] Each request was made during the cross-examination of these witnesses. We find no error was committed by the District Court's failure to turn over these grand jury minutes.

Amabile relies principally on *Dennis v. United States,* 384 U.S. 855, but that case adheres to the earlier standard that a trial court need not allow the defense to

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[7] Excerpts from Riley's grand jury testimony were appended to Battaglia's petition for rehearing of his appeal. They show that Amabile purportedly made the following threat to Riley in 1964 as to the tax investigation of Riley:

> "Don't tell them anything. You know what happens to guys who talk, don't you?"

Riley replied to Amabile and Palermo: "What is the matter with you guys? On one hand you tell me you will kill me if I don't pay you the money; on the other hand these guys [Internal Revenue agents] tell me they will put me in jail."

examine grand jury minutes in the absence of a showing of a particularized need. At the time that Amabile's counsel requested the grand jury testimony of each of these witnesses, unlike counsel for the defendants in *Dennis,* he did not show particularized need and cannot now supply that requirement by hindsight.

Here, as in *United States* v. *Proctor & Gamble Co.,* 356 U.S. 677, and *Pittsburgh Plate Glass Co.* v. *United States,* 360 U.S. 395, defendants sought a wholesale disclosure of grand jury testimony as a matter of right, whereas in *Dennis* the defendants only sought a disclosure of particular testimony.

Moreover, in *Dennis,* there was a 7-year time lag between the grand jury and trial testimony. Thus as Judge Waterman pointed out in *United States* v. *Youngblood,* 379 F.2d 365, 367 (2d Cir. 1967), "there was reason to assay the latter [trial] testimony, some of which is 15 years after the event against the much fresher testimony before the grand jury" concerning occurrences between 1948 and 1955. Here there was no such significant interval between the 1966 grand jury testimony of these witnesses and their 1967 trial testimony.

When Amabile's counsel asked to inspect the grand jury testimony, the Assistant United States Attorney offered to give a copy to the Court for an *in camera* inspection.[8] This offer was not accepted by defense counsel. If it had been accepted, the statements might have been turned over to them, so that any error in this connection was of defendant's own making.

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[8] The Supreme Court has not disapproved of *in camera* inspection by a trial court in order to enable it to rule on a defense motion for production of grand jury testimony. *Dennis* v. *United States,* 384 U.S. 855, 874.

For all these reasons, there was no abuse of discretion in denying production of the grand jury transcripts.

In *United States* v. *Youngblood,* 379 F.2d 365, 370 (2d Cir. 1967), the Court of Appeals for the Second Circuit promulgated a prospective rule giving the defense access as of right to a witness' grand jury testimony on the subjects about which he testified at the trial, unless the Government can show that access should be denied. At the oral argument of this appeal, the Government stated that it had no objection to such a prospective rule in this Circuit. We approve of the *Youngblood* procedure and adopt it with respect to trials commencing after this judgment is entered.

Amabile's final point is that the District Court erred in failing to order a pre-trial preliminary examination before a commissioner pursuant to Rule 5(c) of the Federal Rules of Criminal Procedure.[9] However, by its terms, Rule 5 was meant to afford an arrested person an opportunity to challenge the existence of "probable cause to believe that an offense has been committed and that the defendant has committed it." As the Supreme Court has stated, a preliminary hearing under Rule 5 is not required where, as here, an indictment has already been returned (*Jaben* v. *United States,* 381 U.S. 214, 220), for the grand jury already has found probable cause for holding the defendant for trial. *Bayless* v. *United States,* 381 F.2d 67, 71 (9th Cir. 1967), *Sciortino* v. *Zampano,*

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[9] Rule 5(c) provides in pertinent part:
"* * * If the defendant does not waive examination, the commissioner shall hear the evidence within a reasonable time. The defendant may cross-examine witness against him and may introduce evidence in his own behalf. * * *"

385 F.2d 132, 133 (2d Cir. 1967), certiorari denied, 390 U.S. 906.[10] Neither the language of Rule 5 nor its history supports Amabile's assertion that its purpose was to afford pre-trial discovery.

The judgment of the District Court is affirmed.

No. 16314.

SWYGERT, *Circuit Judge*, dissenting.

I am constrained to dissent on several grounds. First, I adhere to the views expressed in my dissent in *United States* v. *Battaglia, et al.*, No. 16312 and No. 16313 (7th Cir. Jan. 9, 1968) that there was insufficient evidence of a conspiracy engaged in by Amabile with Battaglia and Evans "to obstruct, delay and affect commerce" in the movement of materials for the construction of the Riley dwelling units in Lansing, Illinois by means of extortion.

Second, regardless of the question of the sufficiency of the evidence to show a conspiracy to extort money, there was no proof of a violation of the Hobbs Act, 18 U.S.C. § 1951. Although this issue was presented obliquely in the Battaglia appeal, Amabile has advanced arguments which bring the question into sharper focus.

The evidence showed that during the construction of the Lansing project, Riley obtained building materials from suppliers located outside the State of Illinois. There was no evidence, however, that there was any delay in

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[10] In *Sciortino*, Judge Hays showed that the contrary rule in *Ross* v. *Sirica*, 380 F.2d 557 (D.C. Cir. 1967), was not supported by a majority of that Court, nor has it been adopted in any other Circuit. See 385 F.2d at p. 134.

the shipment or delivery of these materials. Moreover, there was no evidence than any extortion threat directed against Riley carried with it, express or implied, a threat that the work on the Lansing project would be stopped or hindered.

In *United States* v. *Pranno,* 385 F.2d 387, 389 (7th Cir. 1967), *cert. denied,* 36 U.S.L.W. 3346 (Mar. 5, 1968), we said:

> The Supreme Court has made it clear that the statute is to be construed broadly and is not limited to conduct which directly and immediately obstructs a particular movement of goods in interstate commerce. Extortion by threat to disrupt a local activity the stoppage of which would in turn result in stoppage of interstate shipment of raw materials essential for that activity falls within the act. The statute seems to be read as not only prohibiting the obstruction of commerce by extortion, but also prohibiting extortion by any threat, *the carrying out of which would obstruct commerce.* (Emphasis added.)

I interpret this statement to mean that a threat to extort proscribed by the Hobbs Act must have a reasonable causal relation to interstate commerce. The likelihood of an obstruction to the flow of commerce must be the result of the threat. This essential nexus is missing in the instant case.

The majority, quoting from *Hulahan* v. *United States,* 214 F.2d 441 (8th Cir.), *cert. denied,* 348 U.S. 856 (1954), says that "Amabile was exacting tribute from a builder 'dependent upon interstate commerce for materials, equipment and supplies' and was therefore within the reach of the Hobbs Act." The facts in that case, however, were entirely different from those presented here. There the

defendant, a labor union representative, conspired to extort money from local construction companies by threats of labor unrest. These companies were dependent for the continuation of work undertaken by them upon local labor represented by the defendant, and upon supplies and materials shipped interstate. Thus the extortion threats, if not complied with, would in all probability have brought a cessation of work on the project, thereby interrupting the interstate shipments of construction materials. In the instant case, however, there was no such probability that Amabile's threats to Riley, if not complied with, would have resulted in the interruption of the shipment of construction supplies and materials for the Lansing project. (In fact, it was to Amabile's advantage that the Lansing project proceed without interruption; for only then would Riley have authorized Carlson Construction Company to request "draws" for funds upon the Lawn Savings & Loan Association).

The majority also makes reference to the fact that the "$48,500 payment made pursuant to Amabile's threats depleted Riley Management Corporation's reserves." If a depletion of reserves is all that is necessary to show the requisite affect on commerce, then a threat of any kind to extract money made to a person who happens to operate a business engaged to any extent in interstate commerce comes within the statute's proscription. Under this rationale, a retail store owner, for example, would be afforded federal protection from extortion, regardless of the nature or the likely affect of the threat, simply because his stock of merchandise had in some measure moved in interstate commerce. I do not believe that the Hobbs Act was intended to have such a broad

reach. In that connection, Judge Hastie's statement in his dissent in *United States* v. *Stirone*, 262 F.2d 571, 578, 579 (3d Cir. 1958), *rev'd on other grounds*, 361 U.S. 212 (1960), is pertinent:

> [I]t should be considered and kept in mind that the control and punishment of local extortion is primarily the business of local or state government. The Hobbs Act is an auxiliary and partially duplicating federal superimposition on state law enforcement. In the view of Congress this is a desirable measure of federal assistance to the states in the exercise of their police power. But where state power and responsibility are thus primary and the national government is merely performing an auxiliary function, we should not be eager to stretch federal jurisdiction to cover doubtful cases offering only a tenuous or speculative theory of federal jurisdiction.[1]

Third, an error which alone would require reversal (presented rather cursorily in the Battaglia and Evans appeals) relates to the district judge's restriction of Amabile's cross-examination of William J. Riley. Counsel for Amabile attempted to bring before the jury the facts that Riley was under indictment for theft in the state court, that he was under investigation by the Internal Revenue Service for tax evasion, and that his testimony was given in the hope of securing favorable treatment

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[1] The majority quotes from *Katzenbach* v. *McClung*, 379 U.S. 294 (1964), to support the proposition that, "Since Congress has used all its 'broad and sweeping' commerce power in enacting the Hobbs Act, the courts have rightly attributed great scope to the statute." I respectfully submit that the abstract language quoted from *McClung* has no application to the instant case. A decision upholding the constitutionality of the Civil Rights Act of 1964 under the commerce power can hardly have pertinency to the intended scope of the Hobbs Act.

from local and federal law enforcement officers concerning his allegedly illegal conduct. The district judge refused to permit cross-examination on these subjects.[2]

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[2] The relevant portion of the transcript reads:

[Mr. Bellows, Amabile's counsel:]

Are you the same William G. Riley who was indicted by the Criminal Court of Cook County for thievery in 1966 in the month of February.

Mr. Lamendella: [Assistant United States Attorney] I will object to that, your Honor.

The Court: I will sustain the objection. Mr. Bellows, you know better than that.

Mr. Bellows: I will connect it up, your Honor.

The Court: Mr. Bellows, you know better than that and I direct the jury to disregard that question.

By Mr. Bellows:

Q. Are you under indictment in the Criminal Court Cook County?

Mr. Lamandella: I will object to that.

The Court: I sustain the objection and I direct counsel, Mr. Bellows, to refrain from asking that kind of question. I direct the jury to disregard that question.

Mr. Bellows: May I have a side-bar conference, your Honor, with reference to this?

The Court: No, no side-bar conference after those questions, sir.

Mr. Bellows: May I be permitted to make an offer of proof outside of the presence of the jury?

The Court: In respect to that last question, you may.

* * *

Mr. Bellows: Your Honor, my offer of proof is as follows: I expect to show by cross examination and it may be verified, if you choose to do so, if he denies the fact, that he was indicted in the month of February, 1966, for the crime of theft which is a felony; that the matter has been pending now over a year and that the reason for the extraordinary delay in bringing this matter to justice for a crime of theft—actually it was forgery, but under our new statute, your Honor, it is considered to be

The majority concedes that when "viewed in isolation" defense counsel's "effort to explore Riley's motives for testifying in the Government's favor might be proper." The majority goes on to say, however, that a defendant's right to show that a prosecution witness expects favorable treatment from the Government in return for his testimony

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theft—is that he expects to get consideration, your Honor, from the court and the prosecution in Cook County for his cooperation with the government in this case and for his testimony in this case.

For that reason, your Honor, I think it is extremely important to show motive and reason for his testimony in this case.

The Court: What is the government's position in respect to the offer of proof of the defendant Amabile?

Mr. Lamendella: May we have just a moment?

The Court: Yes.

Mr. Lamendella: If this offer is being made, your Honor, to impeach the witness on the basis of an indictment, we object.

The Court: Do you object to the offer?

Mr. Lamendella: Yes, we do.

The Court: I sustain the objection.

Bring in the jury.

Mr. Bellows: May I add one more point, your Honor?

The Court: I have ruled on your offer. You can't add to an offer once it is made, sir.

Mr. Bellows: I want to explain the position of Lamendella to be inconsistent with my offer. He says he objects to the indictment. This is beyond the indictment.

The Court: He said he objected to the offer.

Mr. Bellows: Well, he said to the indictment.

The Court: You object to the offer of proof?

Mr. Lamendella: I do, your Honor.

* * *

The Court: You may continue, Mr. Bellows, with the cross examination of this witness.

By Mr. Bellows:

Q. Mr. Riley, are you presently under investigation by the Internal Revenue for evasion of taxes?

must be balanced against the rule that the credibility of a witness may not be impeached by showing that he has been indicted or is under investigation, and that the balancing of these conflicting rules entitled the district judge to use his discretion in deciding whether to permit cross-examination on Riley's expectation of favorable treatment.

I do not believe that a conflict between these evidentiary rules, such as the one the majority attempts to erect, exists. The right of a defendant in a criminal prosecution to cross-examine witnesses testifying against him is guaranteed by the sixth amendment to the Constitution. Courts have not been grudging in their protection of this right. As the Supreme Court recently stated in *Pointer* v. *Texas,* 380 U.S. 400, 405 (1965):

Mr. Lamendella: I will object to that, your Honor.
The Court: I sustain the objection.
Mr. Bellows: May I make another offer of proof?
The Court: Yes.

* * *

Mr. Bellows: My offer of proof, your Honor, is that Mr. Riley, the witness on the stand, is presently under investigation by the Internal Revenue; that he has two lawyers prominent in the tax field in criminal cases representing him, and that if he were cross examined, your Honor, he would admit, I am sure, that he knows that his financial affairs are under investigation by the Internal Revenue for failure to account for taxes and for the evasion of taxes, and that his books are in the hands of the Internal Revenue agents, and that he expects to get consideration, your Honor, from the government for his cooperation with them in this case and for his testimony in this case.

The Court: What is the position of the government in respect to the offer of proof of the defendant Amabile?

Mr. Lamendella: We object, your Honor.

The Court: I sustain the objection.

* * *

> There are few subjects, perhaps, upon which the Court and other courts have been more nearly unanimous than in their expressions of belief that the right of . . . cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal.

Both the treatises and the case law recognize the propriety of the kind of cross-examination in which Amabile's counsel sought to engage. Thus Professor McCormick says:

> The law recognizes the slanting effect upon human testimony of the . . . self-interest of the witness in the outcome of the case. Any such partiality, proceeding from any acts, relationships or motives, may be proven to impeach credibility . . . [One such instance is] in a criminal case when the witness testifies for the state and it is shown that an indictment is pending against him, . . .
>
> C. McCormick, Handbook of the Law of Evidence § 40, at 82, 83, 84 (1954).

See *Harris* v. *United States,* 371 F.2d 365 (9th Cir. 1967); *Wheeler* v. *United States,* 351 F.2d 946 (1st Cir. 1965); *United States* v. *Masino,* 275 F.2d 129 (2d Cir. 1960). As the Second Circuit observed in *Masino*:

> Cross-examination is proper when its purpose is to reveal bias or interest on the part of the witness being examined. . . . It was highly relevant and material to bring out that the state court charge . . . had been quashed upon the intercession of the Assistant United States Attorney as was claimed by the defense and not denied by the government. [3] This is the kind of

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[3] The majority says, "As to the state court criminal action, the United States Attorney was of course not empowered to accord any consideration." This observation ignores the possibility that the United States Attorney might have interceded with the local authorities on behalf of Riley, a situation similar to that occurring in *Masino.*

> situation where the widest possible cross-examination should be permitted. The appellant was entitled to have the jury know what had happened with respect to the charge, including any part which representatives of the government had played, so that the jury could draw its own conclusions with respect to possible motives for Brown's testimony. 275 F.2d at 132.

It is apparent from the record that the district judge perceived no "collision" of the kind suggested by the majority. Moreover, any attempt to show the bias of a witness by evidence that he is under indictment or investigation would create the same "collision." Thus the rule enunciated by the majority might preclude cross-examination of this kind in every case, a result contrary to the general rule permitting such inquiry. I believe that Amabile's efforts to question the credibility of Riley by showing his relationship to the Government and the reward he hoped to gain by reason of his testimony was entirely proper and should have been permitted.

Finally, the prejudicial trial errors discussed in my dissent in *Battaglia,* other than the exclusion of the testimony of character witnesses on behalf of Evans, have equal applicability to the instant case. These errors additionally and cumulatively require a reversal.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

In the

United States Court of Appeals

For the Seventh Circuit

SEPTEMBER TERM, 1967 — JANUARY SESSION, 1968

Nos. 16312 and 16313
UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

SALVATORE BATTAGLIA and
DALE EVANS,
Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

January 9, 1968

Before SCHNACKENBERG, SWYGERT and CUMMINGS, *Circuit Judges.*

CUMMINGS, *Circuit Judge.* In February 1967, defendants Dave Evans, Salvatore Battaglia and Joseph Amabile were indicted for conspiring with each other and with non-defendant Rocco Pranno to violate the

Hobbs Act.[1] The gist of the conspiracy charge was that defendants obtained $48,500 from the Riley Management Corporation by extortion. As required by the statute, the indictment also charged that the conspiracy affected interstate commerce, particularly with respect to that firm's construction of the King Arthur Apartments in Lansing, Illinois. The three defendants were found guilty by a jury. Evans' and Battaglia's appeals were heard together and are disposed of in this opinion. Amabile's appeal has not yet been heard.

Because Evans and Battaglia assail the sufficiency of the evidence, it must be summarized in some detail, viewed in the light most favorable to the Government. The evidence showed that William Riley was president of the Riley Management Corporation and that his company was building the King Arthur Apartments in Lansing, Illinois. Since 1962, defendant Evans had been one of his superintendents of construction and was assigned to the Lansing job in June 1964. At that time Riley and Evans discussed letting the sewer contracts for the Lansing apartments. Riley

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[1] In pertinent part, the Hobbs Act provides (18 U.S.C. § 1951):

"(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

"(b) As used in this section —

* * *

"(2) The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right."

told Evans to line up subcontractors but to keep it secret "from the boys in Melrose Park, specifically from defendant Amabile (also known as Joe Shine) and from Nick Palermo. Riley told Evans that if Amabile and Palermo learned of the project, Riley would quite possibly be forced to use them again as subcontractors. Amabile had been connected with earlier Riley projects and had on several occasions threatened Riley and his family. Evans promised to keep the King Arthur Apartment information from Amabile and Palermo. However, a few days later, Riley was requested to go to the office of the Melrose Park Plumbing Company to meet Nick Palermo. Riley acceded. Both Palermo and Amabile were at the meeting. Palermo insisted on their receiving the plumbing contract for the Lansing project. Amabile said that otherwise he would stop Riley's other apartment building projects underway in Northlake and Westmont, Illinois, and that Riley "would be walking the streets with a candy cane." They told him they knew where Riley's mother lived and where his children went to school and that they had a baseball bat to handle "wise guys" like him.

A few days later, Riley complained to Evans about the leak to Amabile and Palermo. Riley told Evans that the Melrose Park group was not to receive any Lansing work from Riley Management Corporation. In August 1964, Riley instructed Evans to obtain a sewer contractor that was "foreign" to Amabile and Palermo.

Amabile had told Mike DiVito, a sewer contractor, that Amabile could not get the Lansing sewer work if DiVito's name were to be on the contract. Amabile advised DiVito and co-conspirator Rocco Pranno to come up with "a good clean fellow" if they were to obtain the business. They suggested Henry La-Key, an experienced construction fore-

man. In September 1964, La-Key was hired by Pranno and DiVito as construction superintendent for a brand new firm, Carlson Construction Company, with the title of president.

DiVito said he and Pranno met with Evans and Amabile at Amabile's apartment in mid-September.[2] Pranno explained to Amabile that La-Key was "clean," but Amabile said that before giving Pranno and DiVito the Lansing sewer job he wanted $20,000 in cash. After looking at Evans' figures, DiVito told Pranno that there would be $20,000 in cash above Pranno's and DiVito's costs and profits for the job. Thereupon Pranno told Amabile that he would give him the $20,000 in cash and Amabile accepted the deal. Afterwards, Pranno told DiVito that Evans was Amabile's "guy" and that DiVito should never say anything in front of Evans because it would get back to Amabile.

La-Key testified that he attended a September meeting at Amabile's apartment with Evans, DiVito and Amabile. Amabile said that he was giving the Lansing sewer job to DiVito and Pranno and cared about nothing except getting his $20,000 "off the top." In La-Key's presence, DiVito later relayed the message to Pranno about Amabile's demand for $20,000. Pranno directed La-Key and DiVito to meet with Amabile and Evans at the El Morocco lounge. At that meeting DiVito told Amabile that there would not be enough money in the contract to pay him $20,000 "off the top." Amabile then instructed Evans to figure a way to obtain more money from the job. Evans tore up the original contract and wrote a new contract, raising the price from $150,000 to $199,600.

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[2] This may be the same Amabile apartment meeting described *infra* by La-Key.

Pranno gave DiVito and La-Key approximately $13,000 to open a bank account for Carlson. In September 1964, Evans advised Riley that he had selected the Carlson Construction Company as the sewer contractor, that its reputation was excellent, and that it was operated by Henry Le-Key. Thereafter, Carlson Construction Company was awarded the sewer contract for about $150,000, to be paid directly to Carlson by a suburban savings and loan association through pay-out slips issued by Riley's company. Carlson commenced the Lansing work in September or October 1964.

In mid-October, Evans told La-Key that the only contracts Evans let at Lansing were the ones Amabile told him to. Evans told La-Key that he did not want Riley to know that Evans knew Amabile. In November, Amabile told La-Key that Evans worked for Amabile, that Amabile had placed Evans in Riley's office, and that Evans would do whatever Amabile told him to do.

Before making the first draw from the savings and loan association, LaKey told Amabile that the draw would be for $57,000. The next day, Amabile and La-Key drove to the hospital where Evans was a patient. Amabile told La-Key that Amabile was going to give $5,000 to Evans as his cut on the job, instead of $7,500. At the hospital Amabile gave Evans a "wad of bills." Evans reduced the estimate for the first draw by approximately $10,000.

On November 12, 1964, La-Key received the first draw for $47,517.97 from the savings and loan association. He deposited $39,000 in Carlson's payroll account, retained $517 for his wages, and gave $8,000 to Rocco Pranno. Three days later, on Amabile's instructions, he drew out $20,000 from Carlson's account and gave it to Amabile.

In late November or early December, La-Key accompanied Amabile to a farm in Pingree Grove, Illinois, where Amabile introduced La-Key to Battaglia [illegible]unning the job for them" in Lansing, Illinois. La-[illegible]ard Battaglia ask Amabile why Evans was getting [illegible]hat kind of money." Amabile explained that he had made a deal with Evans who had "got us the job." Amabile also said he had promised Evans $7,500 and that he would take care of it. The next morning La-Key mentioned to Evans that he had been at Battaglia's farm, and Evans warned him not to talk about it. Later, Pranno explained to Amabile that La-Key should not have been taken to the farm. When Pranno attempted to hit La-Key, Amabile stopped him, saying that he had La-Key down to the farm and that "the man [Battaglia] says he is OK."

Prior to the first draw, Pranno, DiVito and La-Key borrowed $5,000 because Carlson had run short of money. Pranno gave $4,500 of this amount to La-Key to deposit for Carlson. This loan was not repaid by January 1965. Later that month Pranno told Amabile about this in DiVito's presence and asked Amabile to locate La-Key so that the loan could be repaid. Several days later Pranno told Amabile that he was going to "the farm" to see "the man" in order to have Amabile obtain $5,000 from La-Key to pay back the loan. At the resulting Battaglia farm meeting, attended by Amabile, Pranno and DiVito, Pranno mentioned that $20,000 from the Lansing sewer job was intended for Battaglia, who then nodded. The second time the $20,000 was mentioned for Battaglia, he said "yes." Battaglia also said:

> "'Well, I don't think Hank La-Key is such a bad guy, I like him, I like to work with him,' that they had other things coming up, and that they could use him again because he was clean."

He told Pranno that he would see what he could do for him as to the $5,000. On the drive back from the farm, Pranno told DiVito that he thought Amabile was short-changing Battaglia and keeping $10,000 of the $20,000 for himself.

In January 1965, LaKey advised Evans that Carlson did not have enough money to pay for necessary materials. Evans told La-Key not to worry, saying:

> " 'I will talk to Joe Shine [Amabile] and Joe Shine will talk to the man [Battaglia or Riley[3]]. We will see that the money is in the bank for you.' "

That same month Amabile told La-Key to prepare the papers for the second draw. La-Key said that the second draw would be for $60,000. Amabile said this was too high and that he would determine how much it should be and would straighten it out with Evans. That same night, Evans went to La-Key's home and changed prices to bring the draw down to $48,000. Evans told La-Key to present the second draw papers to Sol Meltzer, Riley's financial officer. However, Meltzer refused to authorize this draw. Thereupon, La-Key went to see Amabile. Evans was present while La-Key told Amabile what had happened. The next morning La-Key picked up Evans. They entered Riley's office separately. Riley said that he would authorize a pay-out only when Carlson had paid its suppliers. At this meeting La-Key told Riley that the cost of the job had gone up to $200,000. Evans explained that this was because "complications set in on the job."

La-Key thereupon reported to Amabile that the second draw was still not authorized. Amabile told La-Key to

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[3] In other instances in the record, the evidence supports a finding that the expression "the man" refers to defendant Battaglia.

accompany him to Riley's office the next morning. On the following day Amabile told Riley that he had to pay La-Key because "the man" [Battaglia] wanted La-Key paid. Amabile said that otherwise there would be "all sorts of trouble." Because of his fear of physical harm and economic collapse, Riley authorized the second draw of $48,512.48. This was the sum mentioned in the indictment and was deposited by La-Key in a Carlson account. A few days later, Amabile instructed La-Key to draw out $17,000. LaKey thereupon obtained $5,000 in cash and a certified check for $12,000. Amabile insisted upon all cash and ordered Evans to accompany La-Key to cash the check. After the $12,000 check was cashed, La-Key and Evans went to Amabile's apartment, and La-Key gave Amabile the $17,000. Amabile then gave La-Key $5,000, of which La-Key gave Evans $1,000. Amabile told La-Key to take a vacation, and he went to Florida. Shortly thereafter, Evans advised La-Key to return to Chicago, at Amabile's request. Amabile then complained that La-Key had not been paying Carlson's bills, thus getting Amabile in trouble with Riley and " 'making Dave Evans lose his job. You are taking my man [Evans] right out of Riley's.' " La-Key than told Amabile that there was no money in the Carlson account because Amabile had bled it.

A few days later, La-Key complained to Evans that the Carlson bills were unpaid because of Amabile's actions. La-Key asked Evans why he didn't get out of the business. Evans replied:

> " 'I can't get out. I am in too deep with Joe Shine [Amabile]. I know too much about the other people. * * * I can't quit. I wish I could get back to my own job where I came from.' "

Evans then said that he wished he had never met Amabile and reiterated that he was in too deep to quit.

Sufficiency of the Evidence as to Evans

Evans and Battaglia concede there was enough evidence of a conspiracy to obtain money from Riley Management Corporation by fraud. Evans admits that there was sufficient evidence that he was a party to that conspiracy. He also admits that Amabile used extortion to induce Riley to authorize the second draw. However, Evans contends that there is no evidence to show that the extortion was pursuant to a conspiracy of which he was a member. We reject that contention.

On this record, it is obvious that Evans knew of Riley's fear of Amabile. Although Evans took the stand, he significantly never explained that violence was not contemplated. La-Key was told by Evans that he would talk to Amabile, and that Amabile would talk to "the man" (Battaglia or Riley in this instance; see note 3 *supra*) in order to get the second draw paid. Evans knew that Riley was unwilling to pay the second draw because Carlson's bills were unpaid, and that Riley was afraid of Amabile. The jury could properly infer that Evans knew Amabile would induce Riley—through fear—to authorize the second draw. After the second draw, La-Key withdrew another $17,000 for Amabile, who then gave La-Key $5,000, who in turn gave Evans $1,000.[4] Even though he may not have spoken to Amabile about the second draw, Evans' own statement to La-Key should his willingness to take part in a course of action which would cause payment by coercion. It would be unreasonable to suppose

[4] Previously, according to La-Key, Evans had received another "wad of bills" from Amabile.

that Evans would be so closely associated with Amabile in the scheme to defraud without realizing that Amabile would employ coercive means for obtaining the second draw. Cf. *Pereira* v. *United States*, 347 U.S. 1, 12-13. As in *Lefco* v. *United States*, 74 F.2d 66, 68, 69 (3rd Cir. 1934), Evans has resorted to a conspirator's common contention, made in extremity, that he was a party to a subconspiracy not charged in the indictment, but our digest of the evidence discloses evidence quite sufficient to sustain the allegations and finding of his participation in a single conspiracy to obtain money, encompassing extortion as well as fraud.

Evans has relied on *Stirone* v. *United States*, 361 U.S. 212; *United States* v. *Critchley*, 353 F.2d 358 (3rd Cir. 1965), and *Carbo* v. *United States*, 314 F.2d 718 (9th Cir. 1963), certiorari denied, 365 U.S. 861. None is apposite. In *Stirone*, the Court condemned the variance between indictment and proof. As we have seen, the proof here is consistent with the indictment. In *Critchley*, the evidence did not show any threat at the critical time, so that there was no extortion. Here there was ample evidence that co-conspirator Amabile threatened Riley with violence to obtain the second draw, and of course Evans is chargeable with his co-conspirator's acts in furtherance of the conspiracy.[5] In *Carbo*, Gibson had legitimate business reasons for his association with the conspirators, where Evans' associations with Amabile were clearly for illegal purposes.

Sufficiency of the Evidence as to Battaglia

As noted above, during DiVito's, Pranno's and Amabile's February (or early March) 1965 visit to Battaglia's

[5] *United States* v. *Sansone*, 231 F.2d 887, 892 (2d Cir. 1956), certiorari denied, 351 U.S. 987.

farm, Battaglia said he liked La-Key and they could use him in other things because he was clean. From this, the jury could infer that Battaglia had embarked "on a criminal venture of indefinite outline" (*United States* v. *Andolschek,* 142 F.2d 503, 507 (2d Cir. 1944)). He was committed to a long-term relationship contemplating the use of La-Key in numerous ventures. Battaglia admitted knowledge of Evans' paid role. He also acknowledged that he was to receive a $20,000 cut from Riley through the Carlson contract at Lansing. Since Battaglia had a stake in the outcome of the conspiracy, even the stringent test of conspiracy liability evolved by Judge Learned Hand in *United States* v. *Falcone,* 109 F.2d 579, 581 (2d Cir. 1940), affirmed, 311 U.S. 205, was satisfied. Battaglia was also the arbiter of disputes among the co-conspirators. Being an associate of Amabile in this venture, Battaglia is properly chargeable with knowledge that his confederate, Amabile, would resort to threats if necessary to extract money from Riley. Battaglia had to "take his chances" as to the methods used by the other co-conspirators, *United States* v. *Andolschek, supra.* As in *United States* v. *Kahaner,* 317 F.2d 459, 468, note 4 (2d Cir. 1963), certiorari denied, 375 U.S. 835, 836, "there was ample evidence to raise a question for the jury whether he had joined in the conspiracy; if the jury so found, he [a co-conspirator who held the bribe money] was criminally responsible for the acts of the other conspirators and his own failure to perform more than a few overt acts would be immaterial." Evidence of knowledge of the details of the plan or of participation of others is not required. *United States* v. *Hickey,* 360 F.2d 127 (7th Cir. 1966), certiorari denied, 385 U.S. 928.

Intent to Affect or Knowledge of Effect on Interstate Commerce

Battaglia insists that it was necessary to find that he intended to affect or had knowledge that the conspiracy would affect interstate commerce, and that there was insufficient evidence of such intent or knowledge. A similar argument was rejected in *United States* v. *Varlack,* 225 F.2d 665, 672 (2d Cir. 1955). As we recently held in *United States* v. *Pranno,* .... F.2d .... (7th Cir. 1967):

> "All that must be proved, however, is that defendants conspired to commit extortion, and that the natural effect of corrying out their threat, whether they were conscious of it or not, would affect commerce."

The District Court charged the jury that "all that is necessary is that the natural effect of the acts committed pursuant to the conspiracy was to effect, delay or obstruct [interstate] commerce," and that the requisite effect on commerce would be found if the jury believed "beyond a reasonable doubt that the defendants' activities as shown by the evidence in any way or degree obstructed, delayed or affected commerce." These instructions were proper under the Hobbs Act. Neither Battaglia nor Evans argues that the extortion would have no effect on interstate commerce. Here, one of the means to accomplish the extortion was the threat otherwise to cause Riley Management, Corporation "all sorts of trouble." Many interstate deliveries were being made to its Lansing project. If Amabile's threats to destroy Riley had been carried out, this interstate commerce would necessarily have been obstructed. The Hobbs Act covers such a situation. *United States* v. *Pranno, supra.* Furthermore, the Riley company's reserves were depleted by the extortion. Since its

business depended, in part, on ability to pay for interstate shipments to the Lansing site, the jury could infer that the extortion would have an effect on interstate commerce. Under the language of this statute (see note 1, *supra*), that is a sufficient nexus with interstate commerce.

Denial of Bill of Particulars

Evans' briefs do not contest the denial of requests Nos. 2 and 3 in his motion for a bill of particulars.[6] However, Battaglia adopted these requests and argues that the District Court erroneously denied them. Specifically, Battaglia asserts that he was entitled to information about the 1962 and 1963 Palermo-Amabile threats to Riley with respect to his Northlake and Westmont, Illinois, projects. However, requests Nos. 2 and 3 provide:

> "2. State the acts or things done by the petitioner [Evans and, by adoption, Battaglia] by which he and the other named and unnamed persons, combined, confederated and agreed together to obstruct, delay and affect commerce as charged.
>
> "3. State the dates, times and places when and where the alleged acts set forth in paragraph 2 above were done or performed."

Even if the District Court had ordered the Government to answer these requests, the Palermo-Amabile threats would not have been revealed. Since Battaglia did not ask for this information below, he may not assert error in this respect. Furthermore, none of the *five* requests in the motion for a bill of particulars covered this subject matter. Therefore, the Government was not required to

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[6] The other three requests were granted and the Government answered them.

respond as to it. No abuse of discretion has been shown with respect to the partial denial of this motion. *Wong Tai* v. *United States*, 273 U.S. 77, 82.

Conspiracy Instruction

During the early portions of the trial, the District Court refused to permit the Government to have the defendants' declarations considered against all of them. Later in the trial, upon motion of the Government, the Court instructed the jury as follows:

> "Before we proceed with the taking of further testimony in this case, I have a direction and instruction to give you, to make to you.
>
> "You will recall during the course of this trial certain testimony was admitted in evidence only as to one or more of the defendants, and you were instructed at that time that such evidence was not then to be considered against any defendant to whom the evidence did not pertain.
>
> "It is now my responsibility under the law, to instruct you that such evidence is admissible against all of the defendants as evidence in connection with the alleged conspiracy charged in the indictment, whether or not each of the defendants was present when the acts or conversations or incidents testified about were done or carried on.
>
> "You may consider then such evidence as pertaining to all of the defendants."

Citing *United States* v. *Pronger*, 287 F.2d 498 (7th Cir. 1961), Battaglia complains that this instruction was a direction to the jury that a conspiracy had been proven and that each defendant was a member of that conspiracy. However, the last paragraph of this instruction referred to "the alleged conspiracy" and did not tell the jury that the Government had proved a conspiracy. A later in-

struction made it plain that the jury could not consider acts and declarations of one conspirator against the others unless the jury found the existence of a criminal conspiracy and that the acts and declarations were in furtherance of the conspiracy.

The *Pronger* case is not controlling here. The terms of the instruction in that case were dissimilar to those here, and any defect in that instruction was apparently not cured by a later instruction. Conspiracy instructions similar to those here were approved in *United States* v. *Bernard,* 287 F.2d 715, 719-20 (7th Cir. 1961), which reinforces our conclusion that the later instruction made the risk of prejudice too slight to justify reversal. *Pronger* has been confined to a situation where the erroneous instruction was in effect given as part of the charge and does not apply where, as here, trial time intervened between the ascribed comments and the final, proper charge. *United States* v. *Allegretti,* 340 F.2d 254, 256 (7th Cir. 1964, *en banc*), certiorari denied, 381 U.S. 911.

Battaglia claims that the jury was not told that it could not consider acts or declarations of a co-defendant made outside the presence of a defendant against the absent defendant unless it found that a conspiracy existed and that the acts and declarations were in its furtherance, but an examination of the transcript shows that such an instruction was given.

Admission of Pre-indictment Threats Made by Amabile and Palermo and Admission of Statements of Co-conspirator Pranno

Battaglia also asserts that the District Court erroneously admitted Riley's testimony of 1962-1963 threats by Amabile and Palermo and erroneously admitted Pranno's

statements outside the presence of the defendants. We agree with the Government that the Palermo-Amabile threats were relevant to show the reasonableness of Riley's fear when confronted with Amabile's demand to authorize the second draw. The District Court carefully instructed the jury that this testimony was limited to that purpose (Tr. 2564).

As to Pranno, the evidence concerning his January 1965 visit to Battaglia's farm, as well as other evidence previously summarized, shows that he was a co-conspirator of Battaglia and Amabile, so that La-Key's and DiVito's testimony concerning Pranno's statements outside the presence of defendants was properly received.

Accomplice Instruction

Battaglia complains that the District Court's accomplice instruction advised the jury that DiVito and La-Key were accomplices. The instruction was as follows:

> "I must tell you, ladies and gentlemen of the jury, that an accomplice is one who unites with another person in the commission of a crime voluntarily and with common intent. An accomplice does not become incompetent as a witness because of participation in the criminal act charged. On the contrary, the testimony of an accomplice alone, if believed by you, may be of sufficient weight to sustain a verdict of guilty even though not corroborated or supported by other evidence. However, you should keep in mind that such testimony is to be received with caution and weighed with great care. You should not convict any defendant upon the unsupported testimony of an accomplice unless you believe the unsupported testimony beyond all reasonable doubt."

This instruction does not say or imply that DiVito and La-Key were accomplices. The instruction obviously means

that if a person is found to be an accomplice, his testimony should be scrutinized with special care. A similar instruction has been proposed by Judge Mathes for the use of the District Courts. 20 F.R.D. 244. Such cautionary instructions were advocated in *United States* v. *Bucur,* 194 F.2d 297, 305 (7th Cir. 1952); *Wainer* v. *United States,* 82 F.2d 305, 308 (7th Cir. 1936), affirmed, 299 U.S. 92, and *Ruvel* v. *United States,* 12 F.2d 264, 265 (7th Cir. 1926). Battaglia relies on *United States* v. *Balodimas,* 177 F.2d 485, 487 (7th Cir. 1949), but there the district judge termed two named witnesses as accomplices. Here the jury had already been instructed that it was the exclusive fact finder, and there was sufficient evidence from which the jury could find that La-Key and DiVito were accomplices of the defendants. In this setting, the giving of this instruction was not erroneous.

Restriction of Cross Examination and Refusal to Admit Defense Exhibits

Battaglia assails the District Court's rulings restricting the cross examination of DiVito, La-Key and Riley; he also assails the court's refusal to receive certain defense exhibits. A study of the cross examination of these witnesses shows that the District Court allowed defense counsel considerable latitude.

Battaglia's counsel attempted to show that a tax indictment had been dismissed against DiVito in return for his agreeing to be a government witness in this case. Battaglia's counsel cross examined DiVito extensively about a "deal" to drop the income tax charge if DiVito testified for the Government in the instant case. Later the First Assistant United States Attorney in Chicago testified that the reasons for the Government's dismissal "were that Mr. DiVito's lawyer served us with that motion showing

that he had paid his taxes, attaching the check and the receipt and it was obvious that we had no case * * * ."[7] He also testified that the Assistant United States Attorney in charge of the DiVito case was satisfied that proof the tax had been paid in 1964 was a defense to that indictment. If Battaglia's counsel was still not satisfied why the DiVito indictment was dismissed, he could have also called the Assistant United States Attorney in charge of that matter.

The District Court refused to permit the defense to put into evidence the court file and docket entries relating to DiVito's tax case, but they were merely cumulative and did not reveal any "deal." Hence their exclusion was not prejudicial to Battaglia.

Battaglia endeavored to show that La-Key was responsible for the milking of the Carlson Construction and Equipment Company. The defendants were given ample opportunity to examine La-Key regarding the balances in the Carlson bank accounts. The District Court did sustain the Government's objection to certain checks. But Battaglia was not prejudiced by this ruling, for the checks were already reflected by ledger sheets that had been received, thus enabling Battaglia's counsel to argue that La-Key had looted the Carlson Company for his own personal gain. In addition, the checks were being offered in an attempt to contradict a witness on a collateral matter not relating to the $48,500 allegedly extorted. This is impermissible. *United States* v. *Masino,* 275 F.2d 129, 133 (2d Cir. 1960); *United States* v. *Sweeney,* 262 F.2d 272, 276-277 (3rd Cir.

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[7] By allowing this testimony, the trial judge acted consistently with the rule that bias or interest of a witness is not a collateral issue, and that extrinsic evidence is admissible thereon. *United States* v. *Lester,* 248 F.2d 329, 334-335 (2d Cir. 1957); 3 Wigmore on Evidence (3rd ed. 1940) §§ 948-950, 1005(b); McCormick on Evidence (1954) § 40, pp. 85-86.

1959). 3 Wigmore on Evidence (3rd Ed. 1940) § 979. Prior contradiction may be shown only on a matter material to the substantive issues of the trial. *Gordon* v. *United States,* 344 U.S. 414, 420; note 13. As noted there, a trial judge has "wide latitude in control of cross examination, especially in dealing with collateral evidence as to character." 344 U.S. at p. 423.

Next, Battaglia states that he was precluded from showing Riley's purchase price for the Lansing land. It is true that the real estate contract was not admitted by virtue of the best evidence rule. But earlier Battaglia had shown through Robert Biederman's testimony that the price was about $140,000. Since the disparity between the purchase price and the price used in loan negotiations was already in the record, no prejudice stemmed from this ruling.

Battaglia complains too that Riley's February 5, 1960, bankruptcy petition should have been admitted. Again, the District Court had broad discretion to refuse it as a collateral matter. *United States* v. *Bender,* 218 F.2d 869, 874 (7th Cir. 1955), certiorari denied, 349 U.S. 920. Riley's bankruptcy petition supposedly stated that he owned no stocks or bonds as of that date, but this record does not show that the bankruptcy statement was "obviously perjured" as Battaglia claims. No abuse of the District Court's discretion has been shown in this exclusionary ruling.

Battaglia complains that in Amabile's cross examination of Riley, Amabile was not permitted to show that Riley's October 5, 1965, statement to the Federal Bureau of Investigation did not refer to the 1962-1963 threats of Palermo and Amabile. However, Riley testified that he had advised the FBI of these threats and added: "I have only read two pages [of the October 5 statement] and I see it in there, yes, sir." If Battaglia's counsel considered the

point worth pursuing, he could have called FBI agents Dahlman and Kotsos to prove the contrary. *United States* v. *Borelli,* 336 F.2d 376, 391 (2d Cir. 1964), certiorari denied, 379 U.S. 960.

In his reply brief, Battaglia's counsel contends that the Government should have granted his request for production of DiVito's grand jury testimony.[8] No particularized need for this testimony was shown, nor was there any showing that the ends of justice required production. Therefore, production was unnecessary. See *Dennis* v. *United States,* 384 U.S. 855, 868-875.

As to Battaglia's principal cases cited to show reversible error, in *Alford* v. *United States,* 282 U.S. 687, defense counsel was not permitted to establish that a prosecution witness was in government custody and therefore might expect consideration. In this case, the defense was permitted to show that both DiVito and Riley were in government custody. In *Spaeth* v. *United States,* 232 F.2d 776 (6th Cir. 1956) and *United States* v. *Hogan,* 232 F.2d 905 (3rd Cir. 1956), the defense sought to cross examine government witnesses who stood convicted of a federal offense, in an effort to show that they expected leniency in return for their testimony. The District Court refused to allow such cross examination. In this case, Battaglia's counsel subjected DiVito to a lengthy cross examination about the reasons for the dismissal of the tax evasion indictment against him. This also serves to distinguish *United States* v. *Masino,* 275 F.2d 129 (2d Cir. 1960), where such cross-examination of government witnesses was not permitted.

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[8] Battaglia's counsel did not request the production of La-Key's and Riley's grand jury testimony.

Gordon v. *United States*, 344 U.S. 414, *United States* v. *Beekman*, 155 F.2d 580 (2d Cir. 1946), and *Meeks* v. *United States*, 163 F.2d 598 (9th Cir. 1947) deal with the exclusion of documentary evidence showing that the prosecution witnesses had been punished for violating federal law and were still subject to the jurisdiction of the court or agency which had imposed the punishment. In each case, the information contained in the documentary evidence tended to prove bias and was not otherwise present in the record. In this case, the District Judge remarked at one point: "I assume that the government is the only one who could voluntarily move for the dismissal [of the tax indictment against DiVito]." This statement, coupled with the extensive cross examination of DiVito and the examination of the First Assistant United States Attorney in Chicago, told the jury that the indictment had been dismissed on motion of the government. Defendants do not show that any other significant information was contained in the excluded documentary evidence.

Gordon, Masino, and *Meeks* are further distinguishable because in those cases reversal was based on the cumulative prejudicial effect of two or more errors. This case lacks at least one of the errors found in each of those cases.

We approve of the foregoing cases and of the policy of affording the defense wide latitude in showing bias. We do not view the disposition of the issues herein as inconsistent with them.

We have considered Battaglia's other points relating to cross examination, exclusion of documentary exhibits and instructions and find them to be without merit. In closing this discussion, it should be noted that various criticized evidentiary rulings of the District Court were well within

those approved in *United States* v. *Lawinski,* 195 F.2d 1 (7th Cir. 1952). Taken together, the evidentiary rulings here gave these defendants broader latitude than in *Lawinski* and do not amount to an abuse of discretion.

Evans' Character Witnesses

Evans was precluded from showing his good character through four acquaintances. Relying on *Michelson* v. *United States,* 335 U.S. 469, the District Court explained that his evidentiary rulings were based on improperly put questions and on improper foundation. As to some of the questions, this may have been an over-strict application of *Michelson.* However, no foundation was laid to show that these witnesses knew any of the people who lived in the community where Evans resided. Proof of reputation "among a limited group such as fellow employees in a particular building" has been held inadmissible. 335 U.S. at p. 481, note 17; *Williams* v. *United States,* 168 U.S. 382, 397; *Kroot* v. *United States,* 66 F.2d 449, 451 (7th Cir. 1933). Although a more liberal approach to character witness rulings has precedential basis, we adhere to Mr. Justice Jackson's precept not to "disturb rulings of trial courts" in this troublesome field except in rare instances (335 U.S. at p. 480).] (Emphasis added.)

Restriction of Evans' Testimony

Evans argues that the District Court's evidentiary rulings during his testimony denied him an opportunity to present an adequate defense.

It is true that Evans was not permitted to deny certain secrecy admonitions supposedly made about the Lansing project during Riley's June 1964 conversation with Evans, but this was because of the leading and suggestive nature of his trial counsel's questions. To rebut secrecy, Evans' counsel was permitted to elicit that the Riley company had

prepared a brochure to promote sales of the Lansing apartments, and that the Hammond *Times* published a story about the project in August 1964.

The rulings not permitting Evans to answer certain questions as to conversations with Amabile, La-Key, Di-Vito and Pranno were based on the improper form of the questions and lack of proper foundation. These rulings are supportable under rudimentary rules of evidence. Furthermore, Evans was permitted to deny that he met with those persons after his counsel rephrased his questions.

As to the bid sheets, Evans was allowed to testify that there were a signed original and a signed copy of the sewer contract bid sheets, and that the signed original was left in Riley's office, the very points his trial counsel was attempting to elicit.

Since Evans was charged with a January 1965 conspiracy, we cannot state that it was erroneous for the District Judge to consider irrelevant whether Riley held Evans in high esteem in August 1965.

Our study of Evans' testimony shows that he was given great scope in presenting his denials of any part in the conspiracy. The District Court's exclusionary ruling did not jeopardize his defense and were permissible interpretations of the law of evidence.

Evans' Counsel's Inability to Comment on Battaglia's and Amabile's Failure to Testify

Before the defendants presented their witnesses, the District Court instructed their counsel not to refer to the failure of any of the defendants to take the stand. This instruction was of course to protect the Fifth Amendment rights of the two silent defendants, Battaglia and Amabile.

The defenses of the three accused were not mutually exclusive. Also, Evans' counsel's closing argument took advantage of Evans' having taken the stand. There was no "showing that real prejudice will result from the defendant's inability to comment" (*United States* v. *Kahn,* 381 F.2d 824, 840 (7th Cir. 1967), certiorari denied, 36 US Law Week 3251), so that severance was not necessitated.

Trial Publicity

Even though defendants successfully objected to sequestering the jury, Battaglia now argues that prejudicial publicity violated his due process rights. In closing argument, his counsel recognized that the trial court repeatedly admonished the jury to ignore news coverage. There is no claim that any jurors read any of the "prejudicial" articles, thus differentiating the case from *Marshall* v. *United States,* 360 U.S. 310. In *Janko* v. *United States,* 366 U.S. 716, the second conviction was reversed because the trial court had not inquired whether the jurors had read a St. Louis Post-Dispatch article published during the trial and containing "inadmissible prejudicial information."[9] Here the jurors were twice asked whether they had seen articles about the case. None admitted having done so. *United States* v. *Accardo,* 298 F.2d 133 (7th Cir. 1962), and *United States* v. *Largo,* 346 F.2d 253, 256 (7th Cir. 1965), *certiorari denied,* 382 U.S. 904, do not hold that the District Court must always interrogate each juror singly. See *United States* v. *Jannsen,* 339 F.2d 916, 919-920 (7th Cir. 1964).

Battaglia also complains of the presence of a permanent press table inside the bar.[10] The Supreme Court has re-

[9] See Solicitor General's Memorandum filed in the Supreme Court in the *Janko* case.

[10] Such tables have been installed in the various trial courtrooms in the Northern District of Illinois.

cently emphatically disapproved of such an installation (*Sheppard* v. *Maxwell,* 384 U.S. 333), so that the District Judges should consider reserving the bar of the court for counsel in the future (384 U.S. at p. 355). However, we do not consider the placement of this press table to constitute reversible error, for this record reveals no "frequent confusion and disruption of the trial" or "constant commotion within the bar" (384 U.S. at p. 355). In our view, the intrusion of the news media into this trial was not so great as to obviate a showing of prejudice (cf. *Estes* v. *Texas,* 381 U.S. 532 and *Sheppard* v. *Maxwell,* 384 U.S. 333). Battaglia has failed to satisfy us that he was denied a free trial because of adverse publicity.

Eavesdropping

The Government's brief reprints an August 18, 1967, letter from the Assistant Attorney General in charge of the Criminal Division of the Department of Justice to the United States Attorney in Chicago. The letter confirms the Department's pre-trial advice to the United States Attorney that there was no electronic monitoring in this case. Cf. *Hoffa* v. *United States,* 387 U.S. 231. Accordingly, it is now academic whether the District Court should have granted a hearing to determine whether electronic eavesdropping had taken place.

No prejudicial error having been shown, the two judgments are affirmed.

Nos. 16312 and 16313

SWYGERT, *Circuit Judge,* dissenting. This dissent is based on two independent grounds. First, I do not believe that the Government introduced evidence sufficient to convict Battaglia and Evans of the crime charged against

them. Second, although my views on the sufficiency of the evidence would dictate a reversal without remand, a multitude of prejudicial errors occurred which in combination, if not singly, precluded the defendants from receiving a fair trial. Consequently, on the basis of these trial errors, the case should be remanded for a new trial regardless of the insufficiency of the evidence.

I.

Sufficiency of the Evidence.

Accepting the evidence in the light most favorable to the Government, the evidence unquestionably showed that Amabile, Pranno, DiVito, Evans, and LaKey devised and executed a scheme to defraud the Riley Management Corporation by using the Carlson Construction & Equipment Company as a facade so that moneys meant for construction purposes could be diverted to those participating in the scheme. But this scheme was not the one charged in the indictment. The evidence also unquestionably showed that Amabile threatened Riley for the purpose of obtaining money. The record is barren, however, of any evidence, direct or circumstantial, to sustain the charge that Battaglia and Evans conspired with Amabile "to obstruct, delay and affect commerce" in the movement of materials for the construction of the Riley dwelling units by means of extortion.

In early 1964, the Riley Management Corporation began planning the construction of an apartment building at Lansing, Illinois. In June of that year, William Riley, president of the Riley company, requested his construction superintendent, Dave Evans, to start lining up contractors for the Lansing project, but asked Evans to keep the project "secret from Joe Shine [Amabile] and Nick Palermo." A

few days later Riley, at Amabile's request, met Amabile and Palermo at the latter's Melrose Park plumbing company office. Riley testified concerning this meeting:

> Nick Palermo asked me if I was going to build a project in Lansing, Illinois. I told Mr. Palermo that I was and Mr. Palermo asked me when he was going to get the blueprints so that he could figure the work. I told Mr. Palermo that I did not plan on giving him the work. I told Mr. Palermo that he was behind on his existing projects and with the efficiency that we were now enjoying, it was ridiculous to give him this project.
>
> Joe Shine told me that I wasn't going to give it to anyone else other than them and they asked me basically what the hell I was trying to pull, . . .
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> • • •
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> Joe Shine told me that if I didn't give them the work in Lansing, that he would stop the project in Northlake and in Westmont, Illinois. They told me that I had to use them, that if I didn't use them, that they would put me out of business. I told Nick and Joe that they were now in the process of putting me out of business, the way they were doing it. I was told not to be a smart punk.
>
> Joe Shine told me I shouldn't be a wise guy. Joe Shine told me he knew how to handle wise guys and that I would be walking the streets with a candy cane.
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> • • •
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> Joe Shine told me he knew where my mother lived. He would--he told me that he knew where my kids went to school and they had a baseball bat to handle wise guys like me.

After this meeting, Riley gave Palermo the plumbing contract for the Lansing project.

In late July or early August 1964, Amabile met Mike DiVito, a sewer contractor, and Rocco Pranno in the latter's D'Or Supper Club in Stone Park, Illinois. Upon learning from Amabile about the Riley project in Lansing, DiVito asked if he could obtain some of the sewer work. Amabile said "it was possible," but that he didn't want DiVito's name on the contract. A few days later Amabile told DiVito and Pranno that if they came up with "a good clean fellow," they could get the sewer contract for the Lansing project. Shortly after this conversation, DiVito and Pranno persuaded Henry LaKey (who had been a foreman on sewer construction jobs) to work for them if they succeeded in getting the Lansing contract.

In mid-September, DiVito, Pranno, Evans, and Amabile met in the latter's apartment in Northlake, Illinois. Pranno told Amabile that he and DiVito "had a fellow to do the work for us called Hank LaKey and that he was clean." Amabile replied, "Okay, that's fine . . . [but] before I give you this job, I want $20,000 in cash."

During this period, DiVito and Pranno hired LaKey to work for them for $200 per week plus a ten per cent bonus upon completion of the job. They told LaKey they were starting a "new corporation" to be called the Carlson Construction & Equipment Corporation and they would like to have him put "on the paper as president" of the company. In contemplation of giving the sewer work to DiVito and Pranno, Evans apparently drafted a written contract to be signed by Carlson Construction. The contract that Evans originally drew up, however, was unsatisfactory to DiVito and Pranno because they had decided, after looking over the plans, that there would be insuffi-

cient proceeds from the job to pay Amabile the twenty-thousand dollars he had demanded "off the top." At this point, Amabile told Evans to figure a way to get more money out of the job. Evans rewrote the contract raising the price approximately forty to forty-five thousand dollars. After looking at the plans and specifications and seeing the high price of the job pursuant to the rewritten contract, DiVito informed Pranno that "there would be $20,000 in cash above our costs and profits." Pranno then told Amabile in the presence of DiVito and Evans that he would give him the twenty thousand dollars. Amabile replied "Okay, it's a deal." In accordance with their previous discussion, Pranno, DiVito, and LaKey formed the Carlson Construction & Equipment Company. DiVito and Pranno each received forty-five per cent of the stock and LaKey the remaining ten per cent.

Sometime in September, Riley asked Evans whether he had lined up a sewer contractor. Evans said that he had obtained an excellent contractor, Carlson Construction, operated by a man named LaKey. Evans told Riley that he "had looked into Carlson Construction's reputation, it was excellent, and . . . [he] felt quite confident that this man could do a good job." Carlson Construction was given the contract under an arrangement whereby Lawn Savings & Loan Association was to pay Carlson upon receipt of payment slips issued by the Riley company. Carlson Construction commenced the sewer work in September or October, 1964.

Early in November, Amabile instructed LaKey to get the necessary papers ready for making the first "draw." After preparing the papers, LaKey went to see Amabile at the El Morocco, a night club operated by Amabile in Northlake, Illinois. LaKey testified: "Joe Shine [Ama-

bile] asked me how much the draw was for. I told him $57,000. . . . Joe Shine said he would get a hold of Dave Evans and straighten this out." Within a day or two, LaKey and Amabile went to see Evans, who was a patient in Illinois Masonic Hospital. Before they saw Evans, Amabile told LaKey that Evans was going to receive $5,000 as his cut, not $7,500 as originally planned. At the meeting, Amabile gave Evans a "wad of bills." Evans then looked over the papers for the first draw and crossed out a number of items. After the papers had been retyped, reflecting a reduction of $10,000 in the draw, Evans approved the papers and told LaKey to take them to Riley's office. On November 12, LaKey received a check for $47,517.97 from Lawn Savings & Loan Association based on a pay-out slip approved by Sol Meltzer, Riley's comptroller. LaKey deposited $39,000 in the Carlson Construction payroll account. Of the remaining $8,517, LaKey retained $517 and gave Pranno $8,000. Three days later, at Amabile's direction, LaKey withdrew $20,000 in cash from the Carlson Construction account which he gave to Amabile.

In January 1965, Amabile told LaKey to prepare the papers for a second draw. LaKey got the papers ready and showed them to Amabile who asked how much the draw was for. LaKey replied, "$60,000." Amabile thought that this figure was too high, saying, "I don't want that kind of money taken out of the account at this time. . . . I will tell you what to draw." He also said that he would straighten it out with Evans. That same day, Evans reduced the figure to $48,000 and, after approving the papers, told LaKey to present them to Meltzer for the payment slip. When LaKey presented the papers covering the second draw for approval, Meltzer refused to authorize the request.

LaKey immediately went to see Amabile, relating in Evan's presence what had happened. At Amabile's instruction, Evans and LaKey went to see Riley the next day. Pursuant to Evans' request, however, they entered the office separately. When LaKey told Riley that he was there to get the second draw, Riley replied that Carlson Construction's bills were not being paid, and that he would authorize a payment only when LaKey had satisfied these obligations. During the conversation, LaKey told Riley that the cost of the job had gone up from $120,000 to $200,000. When Riley asked Evans to explain why the price had been increased, Evans told Riley, "There's complications set in on the job and we had to raise the price up to get the job done."

LaKey reported to Amabile that Riley had refused to authorize the second draw. Amabile replied: "You be here tomorrow morning. I'll personally go with you to the office myself. I'll get this straightened out once and for all." The next morning LaKey and Amabile arrived at Riley's office and walked in unannounced. Amabile asked Riley why he did not pay LaKey. Riley said he couldn't authorize the draw until LaKey had paid his bills. Amabile then told Riley: "I don't care nothing about that. The man's got his money coming, Bill, I want you to pay his money." At that point, Amabile and Riley went to the back of the office and commenced a conversation during which LaKey "seen a lot of arms moving by Joe Shine," who was doing most of the talking. Then Amabile walked towards LaKey, gave him a wink, laughed, and said, "You'll get your money now." Before leaving, Amabile turned to Riley and said: "Don't forget, Bill, I want you to pay this man. I want you to pay him now. You know what I mean." On the way back to the El

Morocco, LaKey asked Amabile how he was able to tell "a big man like Riley" what to do. Amábile put up his fist and said, "I got this son of a bitch right here, . . . He's afraid of me."

On the witness stand, Riley gave this version of the meeting:

> Mr. Shine told me that I had to pay this man, that this man was a friend of theirs; that I was expected to pay them; that if I didn't pay them all sorts of people would get mad.
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> I told Joe that it would be foolish for me to make this payment; that they were just pushing this company to ruination; that it just was absolutely ridiculous to pay this man and that I did not want to pay him.
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> • • •
>
> Mr. Shine told me that I had no choice on this matter; that I had to pay this man; that the man wanted him paid.
>
> I told him that this was silly. I had a big loan pending with Equitable Life and this thing would, it could destroy everything that we were trying to build up. I told him that, in fact I begged him not to have to pay him. He told me that I had to pay him.
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> • • •
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> He told me the man said I had to pay him and he told me if I didn't pay him there would be all sorts of trouble, and there was no sense in me making this trouble for myself so I better pay him because he was a friend of theirs.

Riley further testified that he subsequently authorized the payment because he was afraid; that he had been subjected to previous threats of physical harm to his

family and his employees and ruination of his company by Amabile and Nick Palermo. Shortly after this meeting, LaKey deposited a $48,512.48 check, received from Meltzer, in the Carlson Construction bank account. Later Amabile told LaKey to withdraw $17,000 from the account. Of this amount, Amabile gave LaKey $5,000; LaKey in turn gave Evans $1,000.

A close analysis of the evidence in this case is essential to determine whether the Government proved the crime charged. The precise charge was a conspiracy to extort money from Riley. The gist of the crime of conspiracy is an agreement between two or more people, rather than the resultant action undertaken pursuant to the agreement. Since the agreement is the gist of the crime, the agreement itself must be proved either by direct or circumstantial evidence. If circumstantial, the circumstances must be such as to warrant the jury in finding that the alleged conspirators had "some unity of purpose, some common design and undertaking, some meeting of minds in an unlawful arrangement. . . ." *Shannabarger* v. *United States,* 99 F.2d 957, 961 (8th Cir. 1938).

The conspiracy charged in this case was allegedly aimed at obstructing and delaying the interstate movement of materials and supplies required for Riley's Lansing project. That obstruction and delay was to result from the extortion of $48,500 from the Riley Management Corporation by engendering fear of bodily and economic injury in William Riley.

There is a substantial question concerning the admissibility of many statements testified to by DiVito, LaKey, and Riley, which were neither relevant to the crime charged nor binding on absent alleged coconspirators.

Assuming for the sake of argument, however, that all their testimony was relevant and admissible, I still do not believe that the evidence shows either that Evans agreed with Amabile and Pranno or that Battaglia agreed with Amabile and Pranno to commit the extortion charged in the indictment.[2]

The evidence with regard to Evans shows that the only agreement or "common design and undertaking" to which he was party was one to bilk Riley company by means of fraud and deceit out of money earmarked for the Lansing job. Consistent with a scheme to defraud, DiVito and Pranno kept in the background, Amabile expressly ordering DiVito to stay off the job. A "good clean fellow," LaKey, was recruited to act through the facade of Carlson Construction. There was constant effort among the conspirators to make sure that Riley was kept in the dark about Amabile's connection with Carlson Construction. Both draws were misrepresented to Riley as being legitimate expenditures. All these facts, as well as many others in the record, are indicia of fraud rather than extortion. Fraud is marked by misrepresentation, deception, and deceit. Extortion is direct and brutal—the very antithesis of fraud.

The Government argues that the most conclusive direct evidence showing Evans to be a "willing participant" in the conspiracy is a statement made by him to LaKey when LaKey expressed anxiety about paying his bills. Evans said: "I will talk to Joe Shine and Joe Shine will talk to the man. . . . We will see that the money is in the bank for you." (This statement was made in January

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[2] There was no proof that Evans and Battaglia had any connection with each other except through common acquaintance with Amabile, DiVito, Pranno, and LaKey.

1965, after the first draw and after Amabile had gotten his $20,000 "off the top.") Subsequent to Evan's statement, arrangements were undertaken for the second draw. Again attempts were made to deceive Riley. Evans decreased the amount of the draw prepared by LaKey. When LaKey failed to get the draw approved, Evans accompanied LaKey to Riley's office, but by prearrangement they entered the office separately. Evans told Riley on this occasion "there's complications set in on the job and we had to raise the price up to get the job done."

The foregoing facts, all involving conduct by Evans occurring after his statement relied on so heavily by the Government, suggest only deceptive conduct on his part, rather than complicity in a scheme to extort. Moreover, these same facts highlight the individual action of Amabile in resorting to extortion. When Amabile realized that the subterfuge was no longer working as it had in the past, he decided to take things in his own hands, and, unknown to the others, unmask the fraud and threaten Riley in order to get an approval of the second draw.[3]

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[3]This use of the phrase "the man," like some of its other uses, (See infra notes 5-7 and accompanying text) fails to identify the person being referred to. The majority recognizes that in this instance the phrase could refer to either Battaglia or Riley. Yet they conclude by implication that Evans was referring to Riley, stating, "The jury could properly infer that Evans knew Amabile would induce Riley—through fear—to authorize the second draw." If he was instead referring to Battaglia, the most damaging aspect of the Government's case against Evans is neutralized. Because the phrase "the man" is so indefinite and ambiguous, only speculation and surmise could supply the purport of a reference to Battaglia. But the same speculation and surmise is necessary to support the majority's rationale that the statement reflected Evans' awareness that Amabile was going to exercise extortion on Riley.

The Government also argues that the creation of Carlson Construction merely "puts a velvet glove on the iron fist with which Amabile and 'The Man' had terrorized Riley in the past." Although past extortion of Riley had been used to obtain contracts, the Government contends that in the present situation, Amabile, with Evan's cooperation, did not have to resort to force to obtain the sewer contract; instead Amabile could wait and exert his pressure to obtain the money obligated by the contract.

In fact, however, this argument reveals the clear import of the evidence in this case—that a fraudulent scheme was practiced on Riley. When Riley flatly refused to approve the second draw even though Evans had tried to persuade him in the other direction by making a bald misrepresentation, Amabile unilaterally, and perhaps spontaneously, reverted to his more accustomed role, that of an extortionist. This unilateral action on the part of Amabile cannot be transformed into a prior agreement with Evans and Battaglia to extort as the Government charged in the indictment.[4]

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[4] The record indicates that prior to the second draw Evans told LaKey that the only contracts Evans would "let out here [Lansing] are the ones Joe Shine tells me." Evans' deep involvement with Amabile is further indicated by a statement Evans made to LaKey after the second draw when he said: "I can't get out. I am too deep with Joe Shine. I know too much about the other people." The day before this conversation, LaKey had been called back from Florida to a meeting attended by Amabile and Evans. LaKey described what took place:

> I got in a conversation with Joe Shine first as soon as I got in the Club, he hollered and told me, he said, "You're not paying the bills, you're not taking care of the job. You got me in trouble with Riley. Riley's in trouble. You're

The slender reed on which the Government depends to demonstrate an agreement to extort between Amabile and Evans is not even present with respect to Battaglia. The evidence touching upon Battaglia's connection with the crime charged may be summarized as follows. Riley testified that although he had never met Battaglia, he had seen him once in early 1964 in Amabile's night club. DiVito testified that he saw Battaglia talk to Amabile in October of that year in Amabile's club. LaKey testified that in late November or early December, he was with Amabile at Battaglia's farm in Pingree Grove, Illinois, where he was introduced as "Hank LaKey running the job for them in Lansing, Illinois." While there, he heard Battaglia ask Amabile why Evans was "getting that kind of money." Amabile replied: "I made a deal with the man. The man got us the job. . . . I promised him $7,500, I'll take care of it." DiVito testified that in February or March 1965, he went with Pranno to Battaglia's farm. Amabile came a few minutes later and the three of them awaited Battaglia's arrival. According to DeVito, Pranno said in Amabile's and Battaglia's presence, "You know about this Riley deal in Lansing

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making Dave Evans lose his job. You're taking my man right out of Riley's. I don't know what is going on. You are causing nothing but trouble."

In sum, although this testimony confirms Evans' association with Amabile, it just as strongly suggests that their association was in furtherance of a scheme to defraud. At the time of the meeting testified to by LaKey, Evans was unaware that Amabile had committed extortion upon Riley to obtain the second draw. The only inference that can properly be drawn from LaKey's testimony, therefore, was that Amabile was attempting to keep the ruse going by conveying the impression to Evans that the scheme to defraud was still in operation.

where we got Hank LaKey to set up the company and do the work for us and figure $20,000 in for you?" Battaglia nodded. Pranno and Amabile then argued whether Amabile had taken LaKey away from Pranno. Battaglia interceded by saying: "Cut it out you fellows. Keep it down." DiVito further testified:

> Then Jim Pranno continued to talk and he says, "You know we had to borrow $5,000 to keep this job in Lansing going and now I can't find LaKey, and you know there was $20,000 in this deal for you." Mr. Battaglia nodded, says "Yes." And then Jim Pranno continued and says, "I want to know what Joe Shine is doing to me. I want you to tell Joe Shine to get that $5,000 from LaKey so that we can pay back this loan," and Jim Pranno continued on to say that Hank LaKey was a no good s.o.b. Then Mr. Battaglia says, "Well, I don't think Hank LaKey is such a bad guy, I like him, I like to work with him," that they had other things coming up, and that they could use him again because he was clean. And after a minute or so, a pause of about a minute, then Mr. Battaglia got up out of his chair and said, "Rocky, I'll see what I can do for you."

On this record there is absent any evidence, direct or circumstantial, demonstrating that Battaglia knew that money was to be extorted from Riley or that threats were to be made to Riley by Amabile. Nor is there any evidence that Riley feared Battaglia or that Battaglia received any of the money extorted from Riley. Finally, there is no evidence that Battaglia agreed with Amabile, Pranno, or Evans to commit the crime charged against them. Yet the Government argues in its brief:

> Just as Evans acted at Amabile's direction, Amabile worked at the direction of the defendant Battaglia.

Amabile was the muscle while Battaglia was the brains, setting policy and settling disputes. His veil of secrecy was his supposed anonymity, known to a few as "The Man." When one wanted to see "The Man," one went to "The Farm."

From the foregoing evidence a jury could infer that Battaglia had a real interest in the outcome of the Lansing project, that he was participating financially in Carlson Construction's contract and that all other co-conspirators acted at his direction, directly as with Amabile, or indirectly, as with Evans.

From his own mouth Battaglia admitted knowledge of Evans' role and that Evans was being paid. Battaglia knew of La-Key's role and that Carlson Construction had the contract on the Lansing project. He knew that La-Key was being used as a front, because "he was clean." With Battaglia's knowledge of the foregoing, the jury could conclude that he was a participant in the conspiracy to place Riley in such a position that when Riley learned that Carlson Construction was in fact Amabile and Battaglia, he would authorize payment of the money in the escrow account, not because of the contract, but because he feared Amabile and "The Man."

These inferences which the Government seeks to draw, some of them non sequiturs, can rise no higher than speculation and surmise.

Much of the Government's case against Battaglia rests on identifying him as "The Man." But of the numerous instances of the use of that phrase in the record, many

refer not to Battaglia, but rather to LaKey,[5] Evans,[6] and Amabile.[7] Battaglia's financial stake in the alleged conspiracy to extort is demonstrated, according to the Government, by his two nods and saying "Yes" at the mention of "$20,000 in for you." Although Battaglia's responses to the mention of the money indicate that he was not a stranger to the Lansing venture, they are in no way probative of his complicity in a conspiracy to extort. The force of the Government's argument in this regard is largely diminished by the fact that "the Brains" [Battaglia], who was supposedly "setting policy," had to be reminded twice by Pranno that he had money coming to him.

Reliance is placed by the majority on two Second Circuit cases, *United States* v. *Andolschek,* 142 F.2d 503 (2d Cir. 1944), and *United States* v. *Falcone,* 109 F.2d 579 (2d Cir.), *aff'd,* 311 U.S. 205 (1940). *Andolschek* is cited in support of the proposition that "Battaglia had 'embarked on a criminal venture of indefinite outline' " and therefore, "had to 'take his chances' as to the methods used by the other co-conspirators." The full text of the passage, however, is more illuminating:

> It is true that a party to a conspiracy need not know the identity, or even the number, of his confederates; when he embarks upon a criminal venture

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[5] When Amabile went to see Riley concerning the second draw, Amabile said, *"The man's* got his money coming, Bill, I want you to pay his money." (Emphasis added.)

[6] When LaKey and Amabile were going to visit Evans in the hospital, LaKey said, "Joe, the deal was for $7,500 for *the man.*" (Emphasis added.)

[7] When Riley first met Amabile and Palermo in April 1962, Riley testified, "Mr. Shine who I had just met struck his face in my face and told me he was *the man* in Northlake." (Emphasis added.)

> of indefinite outline, he takes his chances as to its content and membership, so be it that they fall within the common purposes as he understands them. *Nevertheless, he must be aware of those purposes, must accept them and their implications, if he is to be charged with what others may do in execution of them.* *United States* v. *Andolschek, supra* at 507. (Emphasis added.)

And despite the majority's assertion that the "stringent test of conspiracy liability" set forth in *Falcone* was met by the Government here, that case condemned guilt by mere association.

> There are indeed instances of criminal liability of the same kind, where the law imposes punishment merely because the accused did not forbear to do that from which the wrong was likely to follow; but in prosecutions for conspiracy or abetting, his attitude towards the forbidden undertaking must be more positive. It is not enough that he does not forego a normally lawful activity, of the fruits of which he knows that others will make an unlawful use; he must in some sense promote their venture himself, make it his own, have a stake in its outcome. The distinction is especially important today when so many prosecutors seek to sweep within the drag-net of conspiracy all those who have been associated in any degree whatever with the main offenders. *United States* v. *Falcone, supra* at 581.

There can be no doubt that Amabile and Battaglia associated together, but, as the court stated in *Falcone*, mere association is insufficient evidence of guilt to support a conviction.

II.

Trial Errors

In urging reversal, Battaglia and Evans point to a number of trial errors which they claim not only unduly prejudiced them, but also prevented them from receiving a fair trial. Contrary to the majority's disposition of these contentions, I believe that such errors did occur.

Because of my views on the sufficiency of the evidence, however, I do not believe that an extended discussion of the trial errors is either necessary or appropriate. I only refer to them as they reflect upon the conduct of this trial as a whole, the most striking aspect of which was the unfavorable climate in which the proceedings were conducted. Perhaps no single error occurring outside that climate would be sufficient to require a reversal; however, their cumulative effect, as exemplified by the three errors that will be discussed in detail, leads inevitably to the conclusion that the defendants were denied a fair trial.

A. *Pre-conspiracy Threats*

The indictment charged that a conspiracy among the defendants to violate the Hobbs Act began "in or about July, 1964." Yet, William Riley, the victim of the alleged extortion, was permitted to testify over objection about threats made to him in 1962 and 1963 by defendant Amabile and Nick Palermo. These threats related to Riley's proposed building project in Northlake, Illinois and the subsequent payment of $30,000 to Amabile. Riley also testified about threats made by Amabile and Palermo in 1963 in regard to plumbing work at a Riley building project in Westmont, Illinois. Palermo on that occasion said he "would bury Hubley," Riley's construction super-

intendent, and Amabile said he "would hammer the nails on the coffin." Amabile made other threats to Riley at that time. Purportedly, this testimony was admitted for the purpose of showing the basis of Riley's fear of Amabile in January, 1965. There was ample testimony by Riley, however, of threats made by Amabile after the commencement date of the alleged conspiracy.

According to the majority, the testimony of these threats was "relevant to show the reasonableness of Riley's fear when confronted with Amabile's demand to authorize the second draw. The District Court carefully instructed the jury that this testimony was limited to that purpose." Although I agree that proof of the reasonableness of an extortion victim's fear by testimony of prior threats is generally permissible, the testimony of threats made by Palermo, who was not even charged as an unindicted co-conspirator, was irrelevant for any purpose. Moreover, I am at a loss to find the "careful instruction" referred to by the majority. Because the testimony of threats by Palermo was both irrelevant and inflammatory, the defendants were prejudiced by the district court's failure to instruct the jury to disregard that testimony. *Cf. United States* v. *Critchley,* 353 F.2d 358 (3rd Cir. 1965).

B. *The Accomplice Instruction*

The accomplice instruction was improper because the district judge, in his definition of an accomplice, for all practical purposes told the jury that the crime charged had in fact been committed. In so doing, he invaded the province of the jury. This kind of an instruction would be proper in a prosecution where the alleged accomplice admitted his participation in a conceded criminal offense. In that situation, an instruction like the one given here correctly delineates the weight to be accorded the testi-

mony of the accomplice as that testimony tends to implicate others in the crime that has been committed. In the instant case, however, the crucial question was not who the participants of a conceded crime were, but whether a conspiracy to violate the Hobbs Act, the crime charged, had been formed by the alleged conspirators.

Because the instruction did not explicitly leave open the question whether any of the witnesses were accomplices, the jury may reasonably have interpreted the instruction as a direction from the judge that the crime charged had been proved. To avoid this substantial risk of prejudice, the instruction should have been framed so that the jurors were unequivocally informed that they were the sole judges of whether any witness was in fact an accomplice. Such modification would have cured the instruction's vice — the implied assumption that the alleged conspiracy was a proven fact. See *Gordon* v. *United States,* 353 F.2d 9 (5th Cir. 1965).

C. *Evans' Character Witnesses*

Evans sought to elicit testimony of his good character through four witnesses. Conceding the somewhat inept manner in which this undertaking was attempted by Evans' counsel, the district judge's treatment of these efforts was nevertheless unduly restrictive. Throughout the course of defense counsel's efforts to question the character witnesses, Government counsel interposed objections to all questions directed to an assessment of Evans' general reputation as an honest, truthful, and law-abiding citizen. On almost every occasion, these objections were indiscriminately advanced by the simple statement, "I object." With equal regularity, the judge sustained the objections, only rarely intimating the reasons for this action.

At one point, Evans' counsel, obviously frustrated and bewildered, asked the judge to elaborate on his prior statement that "the question is improperly put." In response, the judge should have either demanded that Government counsel frame his objections in more concrete and specific terms or sustained the objections in a manner to convey to defense counsel the reason for his rulings. His failure to do so worked an unnecessary and prejudicial hardship on Evans' counsel's efforts to elicit character testimony from his witnesses.

In addition, some of the court's rulings sustaining the Government's objections were erroneous. On more than one occasion, a foundation were laid to qualify the witness, and the question posed to the witness was properly phrased. The apparent basis for the rulings sustaining the Government's objections to these particular questions was that the testimony sought related to Evans' reputation in the business community rather than his reputation in the community where he lived. The majority relied on this distinction, stating, "[N]o foundation was laid to show that these witnesses knew any of the people who lived in the community where Evans resided."

Reputation in the business community, however, is no less probative than reputation in the residential community to show the absence or presence of certain character traits in an accused. In this regard, Professor McCormick's observation is apposite:

> The reputation is usually said to be limited to that which obtained in the community where the accused lived, but this should be extended to embrace any considerable group with whom he constantly associated in his business, work, or other continued activity, and who might reasonably be thought to have a collective opinion about him. C. McCormick, Handbook of the Law of Evidence § 158, at 335 (1954).

See also *Whiting* v. *United States,* 296 F.2d 512, 517 (1st Cir. 1961). Because the crime charged against Evans had a business setting, the most probative character evidence was kept from the jury by the court's rulings. These rulings were erroneous. They were also prejudicial. For as the Supreme Court said in *Michelson* v. *United States,* 335 U.S. 469, 476 (1948), "This privilege [of presenting character testimony] is sometimes valuable to a defendant for . . . such testimony alone, . . . may be enough to raise a reasonable doubt of guilt. . . . "

III.

Instead of the traditional presumption of innocence with which criminal defendants are ordinarily clothed, the record in this case suggests that a presumption of criminality attached to the acts of these defendants because of their infamous reputations and notoriety. The defendants may have been guilty of nefarious conduct for which they deserve imprisonment, or they may have had such bad reputations as to be considered menaces to society. Such facts alone, however, cannot warrant a blinding of eyes, permitting a conviction to stand that is based on surmise rather than evidence. This kind of difficulty is present in this case because the charge on which the defendants were convicted and imprisoned, an agreement to extort money, was not sustained by the evidence. No person should be punished under our criminal laws unless he has been proved guilty of a specific offense by competent evidence in a fair trial. Due process of law demands nothing less.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX C

UNITED STATES COURT OF APPEALS
For The Seventh Circuit

Chicago, Illinois 60604

Friday, April 26, 1968

Before
Hon. ELMER J. SCHNACKENBERG, Circuit Judge
Hon. LUTHER M. SWYGERT, Circuit Judge
Hon. WALTER J. CUMMINGS, Circuit Judge

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* No. 16314 vs. JOSEPH AMABILE, *Defendant-Appellant.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the opinion of this Court filed this day.

LIBRARY
SUPREME COURT, U. S.

FILED
JUN 7 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. [redacted] 168

SALVATORE BATTAGLIA, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No.

SALVATORE BATTAGLIA, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Salvatore Battaglia, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, affirming the judgment of conviction for conspiracy to violate the Hobbs Act, 18 U.S.C. § 1951, in the United States District Court for the Northern District of Illinois, Eastern Division.

OPINION BELOW

The opinion of the Court of Appeals is not yet officially reported. It is printed in the Appendix to this petition. (App. 1a).

JURISDICTION

The judgment of the Court of Appeals was entered on January 9, 1968. (App. 66a). A motion to remand to determine the extent of electronic eavesdropping was denied on April 10, 1968. (App. 44a). Petition for rehearing was denied on April 17, 1968. (App. 67a). On May 6, 1968, Mr. Justice Marshall extended the filing time to and including June 10, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. May federal criminal jurisdiction be sustained under the conspiracy to extort provisions of the Hobbs Act without a showing, independent of the rule of vicarious guilt, that a defendant specifically contemplated or would have tolerated the behavior of a co-defendant alleged to constitute the extortion?

2. Whether, under *Dennis* v. *United States,* 384 U.S. 855 (1966), to obtain the grand jury testimony of a key government witness at trial, a conspiracy defendant must do more than request the prior testimony for cross-examination purposes? When a Circuit first gives effect to *Dennis,* may it deny application to trials held after *Dennis* by announcing a Circuit rule prospectively?

3. Whether, under *Smith* v. *Illinois,* 390 U.S. 129 (1968), counsel may be denied the opportunity to ask a key government witness where he lives now?

4. Whether *in camera ex-parte* inspection by the Court of Appeals of materials the Government monitored illegally comports with this Court's order in *Kolod* v. *United States,* 390 U.S. 136 (1968).

STATUTES INVOLVED

18 U.S.C. § 1951, reads in part:

"§ 1951. *Interference with commerce by threats or violence.* (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section—

(1) The term 'robbery' means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term 'commerce' means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States had jurisdiction."

INTRODUCTORY STATEMENT

"Prior cases in this Court have repeatedly warned that we will view with disfavor attempts to broaden the already pervasive and widesweeping nets of conspiracy prosecutions." (Harlan, J.). *Grunewald* v. *United States,* 353 U.S. 391, at 404 (1957). This case presents an opportunity for the Court to give substance to its repeated warnings.

Petitioner was convicted under the Hobbs Act of conspiring to extort, without a trace of a showing that he ever contemplated or would have tolerated the threats alleged to constitute extortion. On the novel theory that the conspiracy was of "indefinite outline", acts and declarations of alleged co-conspirators were swept into evidence against him without any *independent proof* that he agreed to or would have tolerated such behavior. This new conspiracy "net" also unlawfully expands the reach of the Hobbs Act, since federal jurisdiction under that Act is otherwise limited by the statute to "[i]nterference with commerce by threats or violence".

The case also presents other questions of general importance: disclosure of grand jury minutes; the scope of *Smith* v. *Illinois,* 390 U.S. 129 (1968); procedures for determining the impact of Government eavesdropping. The relevant facts are stated in connection with each question presented.

STATEMENT OF THE CASE

The substance of the indictment was that petitioner Battaglia and defendants Evans and Amabile conspired to extort $48,500 from William Riley, President of the Riley Management Corporation, constructing apart-

ments in Lansing, Illinois. (R. 19-21).[1] The case against petitioner rested entirely upon attributing to him, by means of the rule of vicarious guilt, the threatening acts and declarations of co-defendant Amabile. Since this petition contends that there was *no* basis for invoking that rule, the critical evidence pertaining to petitioner Battaglia must be recounted. For convenience, a condensed and chronological summary is presented here, but petitioner otherwise relies upon the summary given in the majority opinion for the Court of Appeals and viewed in the light most favorable to the government (App. 1a).

In June, 1964, Riley asked defendant Evans to line up subcontractors for sewer work at Lansing, but to keep the job secret from defendant Amabile (also known as Joe Shine) and others. (R. 502). A few days later, however, Amabile demanded the plumbing contract of Riley and threatened to use a baseball bat to get it. (R. 506-07).

Early in the summer, Amabile told Rocco Pranno, and Mike DiVito, a sewer contractor that the Lansing work could not be obtained if their names were on the contract.[2] They had to come up with a "good clean guy". (R. 124). Accordingly, in order to deceive Riley, Pranno and DiVito hired Henry La-Key and set up the Carlson Construction and Equipment Corporation with La-Key as nominal president. (R. 126, 127, 130, 132). Amabile was satisfied that La-Key was

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[1] Record references are to the printed transcript of the record in the Court of Appeals, the Joint Appendix.

[2] Pranno, an alleged co-conspirator, was not made a defendant herein.

"clean", but before he agreed to the arrangement, he demanded that $20,000 be available for him. (R. 128).

At about the same time, Evans told Riley that he had selected the Carlson Company because it was run by La-Key and its reputation was excellent. (R. 516). The contract was then awarded to Carlson under an arrangement whereby Carlson would be paid through pay-out slips issued by Riley's company. (R. 519).

When work began in the fall, Amabile told La-Key that Evans was his man in Riley's office and that DiVito should be kept away from the construction site because if Riley's men saw DiVito there, Evans would be in trouble. (R. 281). On Amabile's instructions, La-Key prepared the papers for the first pay-out draw. Evans approved the papers so that the "clean" La-Key might present them to Riley for approval. (R. 300, 301). After approval, La-Key received the first draw and deposited most of it in the Carlson account, but he later withdrew $20,000 for Amabile. (R. 303-306).

In the late fall at a farm in Illinois, Amabile introduced the "clean" La-Key to petitioner Battaglia. He described La-Key as a man "running the job for them" in Lansing. (R. 331). Amabile and Battaglia had a private conversation for twenty or thirty minutes. (R. 332). La-Key then heard petitioner ask Amabile why Evans was getting "that kind of money". (R. 332). Amabile explained "I made a deal with the man. The man got us the job. I made a deal with him. I will take care of it." (R. 332).[3] Although he had told La-Key that Evans' cut would be $5,000, Amabile told

[3] This reference to "the man" clearly points to Evans, not to Battaglia.

petitioner Battaglia that it would be $7,500.[4] (R. 297, 333).

Shortly, thereafter, La-Key told Evans that he had been to the farm and Evans warned him not to talk about it. (R. 340). Later in December, Pranno objected to Amabile that La-Key should not have been taken to the farm. But Amabile responded, "I have had him down to the farm. The man says he is okay."[5]

In January, 1965, La-Key told Evans that he needed more money to pay bills. Evans responded that he would talk to Amabile and "Joe Shine [Amabile] will talk to the man." "We will see that the money is in the bank for you."[6] Amabile then told La-Key to prepare the papers for a second draw. (R. 343). But when Amabile learned that Riley would not authorize the draw, he and La-Key went to Riley's office.[7] (R. 351-2). Riley explained why, but Amabile responded that, "the man" wanted payment and that otherwise

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[4] This is the first, but not the only indication in the record that Amabile was capable of action independent of any understanding he may have had with petitioner Battaglia. See also (R. 174).

[5] The majority opinion suggests that this reference to "the man" points to Battaglia.

[6] The majority opinion concedes that this reference to "the man" may have pointed either to Battaglia or to Riley.

[7] Riley refused authorization because Carlson had not been paying its bills. Amabile complained of that to La-Key and said that as a result he was getting in trouble with Riley and "making Dave Evans lose his job. You are taking my man [Evans] right out of Riley's". (R. 362). La-Key told Amabile that there was no money in the Carlson account because Amabile had bled it. (R. 363). La-Key also complained to Evans and asked him why he didn't get out of the business. Evans replied: "I can't get out. I am too deep with Joe Shine. I know too much about the other people." (R. 364).

there would be "all sorts of trouble."[8] (R. 535). Riley then authorized the second draw of $48,512.48 and testified that he did so in fear of physical harm and economic ruin. (R. 538).

In late January, 1965, after the $48,000 had been obtained from Riley, (i.e., after the object of the alleged conspiracy had been achieved), Pranno told Amabile that he was going to "the farm" to see "the man". (R. 161). Still later, in February or early March, Pranno, DiVito and Amabile met at the farm with petitioner Battaglia. Pranno mentioned that $20,000 from the Lansing project was intended for Battaglia. Battaglia nodded. The second time the $20,000 was mentioned, Battaglia said "Yes". (R. 171). When Pranno spoke disapprovingly of La-Key, Battaglia said:

> " 'Well, I don't think Hank La-Key is such a bad guy, I like to work with him', that they had other

[8] The majority opinion concludes that this excerpted reference to "the man" points to petitioner Battaglia. But in its full context the reference is far from clear and, indeed, more plausibly points to La-Key as the one to whom payment was due. Riley testified that "He [Amabile] told me, 'the man' said I had to pay him and he told me if I didn't pay him there would be all sorts of trouble . . . ." (R. 535) La-Key, also a government witness testifying to the same conversation, heard Amabile say: "The man's got his money coming, Bill [Riley], I want you to pay his money." (R. 352) Shortly thereafter, Amabile turned to La-Key and said "You'll get your money now", and then turned back to Riley and said "Don't forget, Bill I want you to pay this man". (R. 353) And ultimately, La-Key did receive a share of the second draw. (R. 360-61).

In any event, *even if every reference to "the man" in this record is properly regarded as pointing to petitioner Battaglia, there is still no evidence that petitioner authorized or would have tolerated the threats or violence required for a Hobbs Act conviction.* Petitioner may have been "the man" behind an agreement to deceive. But it does not follow that he was "the man" behind an agreement to use threats or violence.

> things coming up, and that they could use him again because he was clean." (R. 171-72).

Apparently, petitioner had no knowledge of the threats, for he still thought Riley had been deceived by the "clean" La-Key.[9]

Riley testified that he had never met petitioner Battaglia, although he had seen him once in Amabile's nightclub in early 1964. (R. 496). His attempt to substantiate that he knew petitioner as "the man" was excluded by the court. (R. 497, 581-82). Riley also testified that Amabile had threatened him in 1962, two years prior to the alleged conspiracy, in connection with work on a wholly different project in Northlake, Illinois. (R. 559-66). Amabile used the expression "the man" at that time as well, although there was no evidence linking that use of the name with the petitioner. And Riley did not testify that he understood the reference to point to Battaglia at that time. (R. 559-66).

In the absence of any evidence, then, that the petitioner ever engaged in, authorized, or would have tolerated threats or violence, Judge Julius J. Hoffman gave the instruction that permitted the jury to consider against petitioner the threatening statements and gestures made by Amabile. (R. 741-42).

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[9] Since the $48,000 had already been obtained from Riley, it is arguable that these statements by Battaglia were inadmissible. Since the object of the alleged conspiracy had been achieved, it is difficult to understand how these statements were made "in furtherance" of any conspiracy. But even if the statement was admissible, it is not evidence that Battaglia authorized or would have tolerated threats or violence. *On the contrary, it seems plain that Battaglia thought that Riley had been successfully deceived by the "clean" La-Key.*

The Court of Appeals, Judge Swygert dissenting, approved of that instruction. Most significantly, however, the court did not pretend that there was evidence, independent of the rule of vicarious guilt, that petitioner specifically participated in or would have tolerated a scheme to extort by threats or violence. Instead, the court relied upon a radical extension of conspiracy theory (App. 10a):

> "... the jury could infer that Battaglia had embarked on a criminal venture of *indefinite outline* [citation] ... Being an associate of Amabile in this venture, Battaglia is properly chargeable with knowledge that his confederate, Amabile, would resort to threats if necessary to extract money from Riley. Battaglia had to *take his chances* as to the methods used by the other co-conspirators." (Emphasis supplied).

REASONS FOR GRANTING THE WRIT

1. CONSPIRACY

A. "Indefinite Outline" Theory

At the heart of this case lies a theory of conspiracy law that extends beyond control both the sweep of conspiracy prosecutions in general and the reach of federal conspiracy jurisdiction under the Hobbs Act.[10] The decision below stands for a novel and wholly unwarranted proposition of conspiracy law: Upon evidence of an agreement to embark upon *some* "criminal" venture, a man is responsible for any crimes his associates may commit, even if they were beyond his

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[10] The Court may therefore exercise both its power of supervision over criminal justice in the federal courts, and its traditional vigilance over the limits that Congress has set upon federal criminal jurisdiction. *United States* v. *Gradwell*, 243 U.S. 476 (1917); *Kann* v. *United States*, 323 U.S. 88 (1944); *Parr* v. *United States*, 363 U.S. 370 (1960).

understanding and would have subverted the plan to which he did agree. He must " 'take his chances' as to the methods used by the other co-conspirators". (App. 10a).

This "indefinite outline" theory of vicarious guilt should plainly be regarded as one of the "attempts to broaden the already pervasive and widesweeping nets of conspiracy prosecutions" that this Court has promised to "view with disfavour", *Grunewald* v. *United States,* 351 U.S. at 404 (Harlan, J.).

In this case, the theory led to a Hobbs Act conviction of a petitioner who may well have agreed to a plan to obtain money from another by deceitful means. He may well have thereby violated some state law. But he was convicted, not of an agreement to use non-violent means, but of conspiracy to extort by threats or violence. It by no means follows that one who would embark upon shady business would also cross the dark line to violence. But a conspiracy prosecution can easily sweep him across that line if this Court permits the theory used below to prevail. For all that is required is some evidence of threats or violence by someone, and some evidence that defendant participated in some shady agreement with that person. At that point, the "nets" of the doctrine employed below first expand to describe the agreement as a "criminal venture of indefinite outline", and then contract to ensnare each defendant in vicarious guilt for the threatening acts and declarations of another. He has, according to the theory, taken "his chances" on the means others would use.

The treacherous character of that theory is manifest in the present case. For even in the light most favorable to the government, the evidence of petitioner's involvement pointed, if anything, to a desire to keep

Riley unaware of the identity and character of those with whom he dealt. The Carlson Company was set up for just that purpose. And La-Key was approved as its head just because he was "clean". Indeed, more than a month after the money had been obtained from Riley, petitioner had not learned of the threats that had been made and still thought the deceit had succeeded. If any venture was proved, then, it was one of "definite outline", not subject to the Hobbs Act, that could only have been subverted by threats or violence. It does violence to common sense to suggest that petitioner took "his chances" on that.

The conspiracy theory announced below also does violence to the unquestioned requirement that the existence of the conspiracy and the defendant's connection with it must be proved by *evidence from an independent source* before the hearsay statements and acts of alleged co-conspirators may be admitted against him. *Glasser* v. *United States,* 315 U.S. 60, 74-75 (1942). "Otherwise hearsay would lift itself by its own bootstraps to the level of competent evidence." 315 U.S. at 75.

Yet it is precisely the use of the bootstrap that this case would authorize. For whatever evidence there may have been of another understanding, there was no independent evidence that petitioner conspired to use extortion. He was connected to a conspiracy to extort only by ignoring the evidence of his actual understanding, and then by labelling the venture a "criminal venture of indefinite outline". Since an "indefinite outline", by definition, can embrace anything, it took only a bootstrap to say that he must have agreed to, or taken "his chances" on, the use of threats or violence. If this Court permits such a theory of conspiracy to prevail, it will have substantially discarded

the independent evidence limitation upon the techniques by which prosecutors transmit guilt vicariously in conspiracy cases.

The Court should note as well that the conspiracy theory used below is entirely unprecedented. The Court of Appeals relied upon an excerpt from *United States* v. *Andolschek,* 142 F. 2d 503, 505 (2d Cir. 1944), the case in which the term "indefinite outline" first appeared. But it was used in *Andolschek* for an entirely reasonable purpose. One appellant, convicted of conspiring to accept bribes, had argued that since his duties were quite different from the other alleged co-conspirators, he could only be convicted of a bribery conspiracy narrower in scope than the one charged.

Reversing and giving directions for a new trial, Judge Learned Hand left open the possibility that a man who has conspired to accept bribes may be a part of a larger conspiracy with others *who agree to the same means.* But nothing in his language, or in the cases that have repeated it, ever suggested that one who agrees to accept bribes or engage in deceitful activity would also be responsible for violence committed by others.[11] See *United States* v. *Kensil,* 295 F. 2d 489,

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[11] Judge Hand wrote: "It is true that at times courts have spoken as though, if A. makes a criminal agreement with B., he becomes a party to any conspiracy into which B. may enter, or may have entered, with third persons. That is of course an error: the scope of the agreement *actually made* always measures the conspiracy and the fact that B. engages in a conspiracy with others is as irrelevant as that he engages in any other crime. It is true that a party to a conspiracy need not know the identity, or even the number of his confederates; when he embarks upon a criminal venture of indefinite outline, he takes his chances as to its content and membership, *so be it that they fall within the common purposes as he understood them. Nevertheless, he must be aware of those purposes, must accept them and their implications, if he is to be charged with what others may do in execution of them.*" 142 F. 2d 503, 507. (Emphasis supplied).

491 (3rd Cir. 1961); *United States* v. *Crosby,* 294 F. 2d 928, 945 (2d Cir. 1961); *United States* v. *Barrow,* 229 F. Supp. 722, 734 (E. D. Pa., 1964).

It makes eminent sense to say that a member of a conspiracy need not know each detail of membership or content in order to be held responsible for them. In that sense, almost every conspiracy has an "indefinite outline." [12] But the shift from deceitful to violent means is no such mere detail. That shift involves the commission of a new crime—and one of an entirely different nature. And the shift is particularly radical where, as in this case, it would have subverted the original understanding. For good reasons then, Judge Hand made plain in *Andolschek* that it is reversible error to attribute partnership in one venture upon no more than evidence of partnership in another.

The abuse in this case of Judge Hand's "indefinite outline" language becomes even clearer when compared with another of his statemnts on conspiracy law. In *United States* v. *Crimmins,* 123 F. 2d 271 (2d Cir. 1941), the Second Circuit reversed a conviction for conspiracy to transport stolen securities in interstate commerce, even though there was sufficient evidence that the defendant had agreed to handle the stolen securities. There was no evidence, however, that the defendant knew of or would have tolerated the interstate traffic alleged.

Judge Hand ruled that absent such evidence, the defendant, clearly a partner in the venture, could not

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[12] It is also possible, of course, that some conspirators may agree to a plan of "indefinite outline"—one in which any means may be used to achieve a given end. See *United States* v. *Crimmins,* 123 F. 2d 271, 273 (2d Cir. 1941). But there was no evidence whatever of such an agreement in this case.

be held responsible for the *means* his co-conspirators used that made the venture a federal conspiracy:

> "It is *never permissible* to enlarge the scope of the conspiracy itself by proving that some of the conspirators, unknown to the rest, have done what was beyond the reasonable intendment of the common understanding. . . . In the case at bar it might have been an implied term of the agreement that Crimmins should take bonds coming from any source; if it had been, he could have been found guilty of the conspiracy, for such an agreement would have dealt with the place of the theft, even though it did no more than provide that the place made no difference. A continued indifference to the source of the bonds, coupled with knowledge that in some cases they had come from beyond the state, would have been evidence of such an agreement. But that was not the situation. . . . The jury might have indeed concluded that if he had known that they came from outside the state, it would have made no difference in his conduct; but that is not enough; it would be no more than to say that he would have been willing to make an agreement which in fact he did not make." *United States* v. *Crimmins, supra,* at 273. (Emphasis supplied).

In short, in the absence of *evidence* that Crimmins would have tolerated an open-ended venture of "indefinite outline", he took no "chances" that the interstate acts of others would supply the required federal element in a conspiracy case against him. Likewise, petitioner Battaglia cannot be held to have taken "his chances" on threats or violence, for there was *no evidence* that he made an open-ended agreement to tolerate any means that others might use. The required federal element—threats or violence—was supplied against petitioner only by turning the careful language of

Learned Hand to a purpose that Hand would have found repugnant.[13]

B. Unlawful Expansion of Federal Criminal Jurisdiction

If this Court permits the "indefinite outline" theory to prevail, it will also have licensed an insidious device for expanding the reach of federal criminal jurisdiction beyond Congressional intent. In this case, a required federal element under the Hobbs Act, wholly missing from the evidence, was supplied by that bootstrap theory. In the next conspiracy case, the theory may be used again to defeat Congressional intention by expanding the reach of yet another federal statute.

The Hobbs Act drew an unmistakably clear line around federal criminal jurisdiction. It includes certain kinds of violence and excludes non-violent activi-

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[13] The court also abused other language authored by Judge Hand. "Since Battaglia had a stake in the outcome of the conspiracy, even the stringent test of conspiracy liability evolved by Judge Learned Hand in *United States* v. *Falcone*, 109 F. 2d 579, 581 (2d Cir. 1940), affirmed, 311 U.S. 205, was satisfied." In this context the "stake in the outcome" test is no more than a rephrasing of the "indefinite outline" theory: if a man has a stake in the outcome of a venture, he takes "his chances" on any *means* that may be used—*i.e.*, the venture necessarily has an "indefinite outline" as to means. Moreover, the "stake in the outcome" test was designed for an entirely different purpose—to hold that even if someone knows of an illegal consequence that will likely follow upon his own legal activity, he is not liable in conspiracy unless he also promotes the illegal venture and has a "stake in its outcome". 109 F. 2d at 581. The test has, therefore, always been regarded as addressing itself to the question of what "in addition to knowledge of the object is necessary to constitute agreement to accomplish it". See, *Developments in the Law: Criminal Conspiracy*, 72 Harv. L. Rev. 920, 931. It was not designed to determine whether one who has knowledge of and a stake in the outcome of *a plan* is also responsible for *another plan* designed to achieve the same object.

ties.[14] Yet with no more than a twist of conspiracy law, the court below turned the Hobbs Act into a federal weapon against non-violent business activity.

Petitioner's activity may have fallen afoul of some state law. But he stands convicted under a federal law that was carefully drawn to leave questions about such activities to local law enforcement. We do not say here that Congress was constitutionally barred from bringing such conduct within the Hobbs Act.[15] But it chose not to do so, and this Court should not permit federal prosecutors to undo that choice. Such a usurpation of legislative prerogative is all the more sinister since it was achieved by inventing a doctrine of conspiracy law unfounded in precedent or policy. And this doctrine, in other statutory contexts, may

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[14] The heading of the statute presents the limitation: "Interference with Commerce by Threats or Violence". And the body of the statute, section (a), specifies that the federal ban extends only to interference "by robbery or extortion" and to one who "commits or threatens physical violence" in furtherance of such purposes. The definition paragraphs in section (b) define only "robbery" and "extortion", and each definition sounds in "force", "violence", and "fear of injury". The House Report on the bill, presented by Representative Hobbs, likewise plainly limits the statute's reach:

> "The objective of Title I is to prevent anyone from obstructing, delaying, or affecting commerce, or the movement of any article or commodity in commerce, by robbery or extortion as defined in the bill . . . . The bill would outlaw *two* kinds of criminal interference with interstate commerce . . . ." (Emphasis supplied). H. Rep. No. 238, 79th Cong., 1st Sess.

[15] Congress has dealt with schemes to defraud private persons in another statute. 18 U.S.C. 2314. But even there it carefully limited Federal criminal jurisdiction to cases in which the person defrauded has been transported in interstate commerce, in execution or concealment of the scheme.

likewise be used to invade the domain of state authority in flat violation of Congressional intent.

Such invasions of state jurisdiction are not merely of technical concern. "Federal intervention also has a tendency to weaken the enforcement efforts of state authorities . . . ." That observation was made by Professor Louis B. Schwartz whom Congress has currently entrusted with direction of the National Comission on Reform of Federal Criminal Laws.[16] By creating that Commission, Congress has once again demonstrated its intent to insure the rationality of federal criminal jurisdiction and the proper allocation of law enforcement tasks as between the local and national governments.[17] These Congressional efforts to draw clean and sensible jurisdictional lines come to naught if those lines can be obliterated by the kind of conspiracy theory upon which this conviction rests.

2. DENIAL OF GRAND JURY TESTIMONY

In *Dennis* v. *United States,* 384 U.S. 855, this Court recognized the particular injustice done when *conspiracy defendants* are denied grand jury testimony of key government witnesses for purposes of cross-examination. Since "[a] conspiracy case carries with it the inevitable risk of wrongful attribution of responsibility to one or more of the multiple defendants . . . it is especially important that the defense, the judge and the jury should have the assurance that the

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[16] The statute creating the Commission is Public Law 89-801, 80 Stat. 1516. Professor Schwartz is the executive director. His observation was made in the context of an article on *Federal Criminal Jurisdiction and Prosecutors' Discretion,* 13 Law & Contem. Probs. 64, 70 (1948).

[17] That federal law enforcement activity should support, and not undermine, local incentive was a concern reflected as well in the report of the President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society,* Chapter 13 (1967).

doors that may lead to truth have been unlocked." *Id.* at 873.

The wrongful attribution foreshadowed in *Dennis* came to pass here. Throughout the trial, counsel apprised the judge that no evidence had been presented to connect petitioner with the conspiracy charged. And, as in *Dennis*, "[t]he charge could not be proved on the basis of evidence exclusive of that" given by the key government witnesses—DiVito, La-Key and Riley—whose grand jury testimony was requested.[18]

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[18] The Court of Appeals stated that petitioner requested only DiVito's testimony. (App. 18a) Consequently, it limited its discussion to that denial. That denial alone warrants the granting of certiorari.

But the record, as a whole, shows that petitioner did not waive his claim with regard to La-Key and Riley. When counsel for Amabile moved for DiVito's grand jury testimony on cross-examination, the court asked him for authorities in support of the motion. (R. 195). Shortly thereafter, the court stated that the research need not be done since the motion would be denied. Counsel for petitioner then adopted the motion and cited *Dennis* in support. The court immediately reiterated the denial. (R. 233).

Later, counsel for Amabile moved for La-Key's grand jury testimony on cross-examination. But the judge summarily denied the motion in words strongly suggesting that he would not entertain such motions with respect to any witness (R. 390):

> "I think we have already told—perhaps it wasn't you but another lawyer. I deny your motion".

Nevertheless, counsel for Amabile moved for Riley's testimony on cross-examination later on. Again the court denied the motion summarily. (R. 689). Thus, counsel for petitioner permitted Amabile's lawyer to move for production and explicitly adopted the first motion. It would have been futile to repeat these motions with respect to each witness since it was apparent that the trial judge was not willing to hear argument on *Dennis* or consider the matter in any detail. Under such circumstances, repetition of the motion would only have exposed counsel to ridicule in the eyes of the jury. See 1 Wigmore, *Evidence*, 318, 331 (3d Ed. 1940); *City of Pittsburgh* v. *F.P.C.*, 239 F. 2d 741, 748 (D.C. Cir. 1956); *Sanchez* v. *United States*, 293 F. 2d 260, 265 (8th Cir. 1961).

384 U.S. at 872. Moreover, just as in *Dennis,* "[t]he testimony of the . . . witnesses concerned conversations and oral statements made in meetings. It was largely uncorroborated. When the question of guilt or innocence may turn on exactly what was said, the defense is clearly entitled to all relevant aid which is reasonably available to ascertain the precise substance of the statements". 384 U.S. at 872-3. And as in *Dennis,* "[t]wo of the witnesses [here DiVito and La-Key] were accomplices . . . A third . . . [here Riley] had reasons for hostility toward" petitioner. 384 U.S. at 873. Petitioner's counsel brought the *Dennis* case to the attention of the trial judge in connection with one request. (R. 233). But the judge, disregarding *Dennis,* denied access to any grand jury testimony.

By approving that denial, the Seventh Circuit set itself in open conflict with three Circuits that have held a defendant's request at cross-examination sufficient to require disclosure of a witness' grand jury testimony. *United States* v. *Youngblood,* 379 F.2d 365, 368-70 (2nd Cir. 1967); *Schlinsky* v. *United States,* 379 F.2d 735, 740 (1st Cir. 1967); *Cargill* v. *United States,* 381 F.2d 849, 852 (10th Cir. 1967). Two other circuits, however, were allied with the Seventh in declining to adopt that reading of *Dennis. National Dairy Products Corp.* v. *United States,* 384 F.2d 457, 461 (8th Cir. 1967); *Allen* v. *United States,* 390 F.2d 476 (D. C. Cir. 1968).

Subsequent to this case, in co-defendant Amabile's appeal, the Seventh Circuit has changed its position and aligned itself with the First, Second, and Tenth Circuits. *United States* v. *Amabile,* No. 16314 (7th Cir. 1968). But the conflict among the circuits remains vivid.

Moreover, the Seventh Circuit promulgated its *Amabile* reading of *Dennis* prospectively so that its rule applies only to trials commencing after the date of the *Amabile* judgment on appeal. (App. 57a) Whatever the right of the Circuits to time their own rulings, they should not be permitted so to control the rulings of this Court. In any event, pure prospectivity of the sort imposed here is particularly inappropriate since the use of grand jury testimony in cross-examination affects "the very integrity of the fact-finding process", *Linkletter* v. *Walker,* 381 U.S. 618, 639 (1965); *Johnson* v. *New Jersey,* 384 U.S. 719, 728 (1966)—the chief criterion the Court has used in rejecting requests for prospective application: *Gideon* v. *Wainwright,* 372 U.S. 335 (1963); *Jackson* v. *Denno,* 378 U.S. 368 (1964). And in this case, the *Dennis* holding was presented to the trial judge as the law at the time of trial. (R. 233). Under these circumstances, the *Linkletter* form of prospective application is the very least that should be required. See 381 U.S. at 622 and Note 5.

Even if the Court wishes to let the circuit conflict ripen further, however, the presence of the disclosure question in this case should be regarded as an added reason for the grant of certiorari.[19] Although *Dennis* does not require a showing of prejudice, an illustration of the damage done should be of interest to the Court in its consideration of the first question presented. The novel doctrine of conspiracy law questioned therein enabled the prosecution to fasten responsibility upon the petitioner for threats of violence made by others.

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[19] Even if petitioner is regarded as having moved only for DiVito's testimony, the question is squarely presented on this record. See Note 18, *supra.*

The transcript of Riley's grand jury testimony, made available at the later *Amabile* trial, reveals that Riley made no mention of the threats of violence alleged to have occured prior to 1964.[20] (App. 68a-101a). Yet he testified to these threats at trial to support the reasonableness of his fear. The transcripts also show that Amabile referred to *himself* as "the man" in a meeting with Riley concerning work on another project. (App. 81a) Hence, if petitioner had been granted access to this transcript in cross-examining Riley, he could have weakened Riley's credibility in general, attacked the reasonableness of his alleged fear, and controverted Riley's statement that he knew petitioner as "the man". Riley's grand jury testimony was, therefore relevant to the critical issue—the threats and petitioner's connection with them. Accordingly, the denial of petitioner's disclosure motion deprived him of a significant means for testing whatever underpinnings there were for the novel conspiracy theory that alone supported his conviction.

3. CROSS-EXAMINATION AS TO RESIDENCE

In the following setting, petitioner's counsel was denied the opportunity to cross-examine Riley, a key government witness, as to his residence at the time of trial: (R. 723)

> Q: Where do you live now, Mr. Riley?
> [Government]: I will object, your Honor and I ask to be heard out of the presence of the jury.
> The Court: Without a hearing, I will sustain the objection.

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[20] The transcript of Riley's grand jury testimony was disclosed in *United States* v. *Amabile*, #67 CR 86, and it is reproduced in the Appendix. It was also included in petitioner's appendix to his petition for rehearing in the Court of Appeals.

As this Court held in *Smith* v. *Illinois,* 390 U.S. 129 (1968), such a denial deprived the petitioner of his right under the Sixth Amendment to confront the witnesses against him. *Smith* reaffirmed the Court's holding in *Alford* v. *United States,* 282 U.S. 687 (1930), requiring reversal of a federal conviction "because the trial judge had sustained objections to questions by the defense seeking to elicit the 'place of residence' of a prosecution witness . . ." 390 U.S. at 132.

Petitioner relied upon the *Alford* case on appeal and presented the intervening *Smith* case to the Court of Appeals on rehearing.[21] The government argued that the trial court had sought to protect the witness from further threats or violence. This argument was without support in the record since the trial court had refused to hold a hearing and, indeed, violence was attributed to the petitioner only by virtue of the unwarranted conspiracy theory challenged in the first question presented herein. Moreover, only Justices White and Marshall of this Court endorsed an exception to this Court's holding in their *Smith* concurrence. 390 U.S. at 133-34. And even these Justices would have required a hearing at trial so that the "judge can then ascertain the interest of the defendant in the answer and exercise an informed discretion in making his ruling." *Id.* at 134. Since the defense was not heard on the matter at trial, it can hardly be contended that the trial judge properly assessed whatever competing factors he would have to weigh even if the *Smith* concurrence were the law.

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[21] Since *Alford* was law at trial and only reaffirmed in *Smith,* no question of prospective application of *Smith* is presented in this case.

Since the majority opinion in *Smith* does not suggest that it is ever permissible to deny a defendant knowledge of a government witness' current residence, a summary reversal of the judgment in this case is appropriate. If, however, the Court intended a more limited rule, oral argument would be appropriate to air the issue.[22]

4. ELECTRONIC EAVESDROPPING

Prior to trial, the petitioner moved for a hearing to determine the existence and extent of electronic eavesdropping. The motion was denied and throughout the case the government avoided a hearing by relying upon its unilateral review policy, condemned by this Court in *Kolod* v. *United States,* 390 U.S. 136 (1968).

After *Kolod,* petitioner filed a motion to remand to the District Court for "an adversary proceeding" comporting with this Court's requirement. In response, the government finally admitted that it had violated petitioner's privacy. It submitted to the Court of Appeals a sealed exhibit containing the "transcript of certain overheard conversations involving defendant Battaglia". (App. 44a). The Court of Appeals denied the motion to remand on the ground that it had conducted an *in camera ex parte* inspection of the submitted materials and had found them irrelevant.

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[22] If a rule of "special circumstances" was intended, the Court should note that, just as in *Alford* and *Smith,* the defense was otherwise prevented from fully exploring Riley's relationship to the government, including the possibility of reward for his testimony. (R. 617-18). See also *United States* v. *Amabile* (App. 47a). Cf. concealment of the witness' real name in *Smith,* 390 U.S. at 130, and the possibility of immunity reward in *Alford,* 282 U.S. at 693.

This procedure flatly violates this Court's directions in *Kolod*. Indeed, on motion to amend the *Kolod* order, the government itself has argued that the trial judge, intimately familiar with the proceedings, should be given the initial opportunity to determine the relevancy of the illegally obtained material. Memorandum for the United States, filed April, 1968, in No. 133 O.T. 1967. Moreover, a trial court adversary hearing would present an opportunity to determine whether the government's presentation of the materials is complete. Given the record of government reluctance in this case, petitioner should not be denied that opportunity.

Petitioner joins in opposition to the government's motion to amend the *Kolod* order. But even if the Court should grant the motion, the judgment in this case should be vacated and the cause remanded to the District Court for an appropriate hearing with the right preserved to seek further appellate review.

CONCLUSION

For the foregoing reasons, petitioner respectfully submits that the petition for a writ of certiorari should be granted.

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June 7, 1968

APPENDIX

Opinions

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

September Term, 1967

January Session, 1968

Nos. 16312 and 16313

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

SALVATORE BATTAGLIA and DAVE EVANS,
Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

January 9, 1968

Before SCHNACKENBERG, SWYGERT and CUMMINGS, *Circuit Judges.*

CUMMINGS, *Circuit Judge.* In February 1967, defendants Dave Evans, Salvatore Battaglia and Joseph Amabile were indicted for conspiring with each other and with non-

defendant Rocco Pranno to violate the Hobbs Act.[1] The gist of the conspiracy charge was that defendants obtained $48,500 from the Riley Management Corporation by extortion. As required by the statute, the indictment also charged that the conspiracy affected interstate commerce, particularly with respect to that firm's construction of the King Arthur Apartments in Lansing, Illinois. The three defendants were found guilty by a jury. Evans' and Battaglia's appeals were heard together and are disposed of in this opinion. Amabile's appeal has not yet been heard.

Because Evans and Battaglia assail the sufficiency of the evidence, it must be summarized in some detail, viewed in the light most favorable to the Government. The evidence showed that William Riley was president of the Riley Management Corporation and that his company was building the King Arthur Apartments in Lansing, Illinois. Since 1962, defendant Evans had been one of his superintendents of construction and was assigned to the Lansing job in June 1964. At that time Riley and Evans discussed letting the sewer contracts for the Lansing apartments. Riley told Evans to line up subcontractors but to keep it secret "from the boys in Melrose Park," specifically from defendant Amabile (also

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[1] In pertinent part, the Hobbs Act provides (18 U.S.C. § 1951):

"(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

"(b) As used in this section—

* * *

"(2) The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right."

known as Joe Shine) and from Nick Palermo. Riley told Evans that if Amabile and Palermo learned of the project, Riley would quite possibly be forced to use them again as subcontractors. Amabile had been connected with earlier Riley projects and had on several occasions threatened Riley and his family. Evans promised to keep the King Arthur Apartment information from Amabile and Palermo. However, a few days later, Riley was requested to go to the office of the Melrose Park Plumbing Company to meet Nick Palermo. Riley acceded. Both Palermo and Amabile were at the meeting. Palermo insisted on their receiving the plumbing contract for the Lansing project. Amabile said that otherwise he would stop Riley's other apartment building projects underway in Northlake and Westmont, Illinois, and that Riley "would be walking the streets with a candy cane." They told him they knew where Riley's mother lived and where his children went to school and that they had a baseball bat to handle "wise guys" like him.

A few days later, Riley complained to Evans about the leak to Amabile and Palermo. Riley told Evans that the Melrose Park group was not to receive any Lansing work from Riley Management Corporation. In August 1964, Riley instructed Evans to obtain a sewer contractor that was "foreign" to Amabile and Palermo.

Amabile had told Mike DiVito, a sewer contractor, that Amabile could not get the Lansing sewer work if DiVito's name were to be on the contract. Amabile advised DiVito and co-conspirator Rocco Pranno to come up with "a good clean fellow" if they were to obtain the business. They suggested Henry La-Key, an experienced construction foreman. In September 1964, La-Key was hired by Pranno and DiVito as construction superintendent for a brand new firm, Carlson Construction Company, with the title of president.

DiVito said he and Pranno met with Evans and Amabile at Amabile's apartment in mid-September.[2] Pranno explained to Amabile that La-Key was "clean," but Amabile said that before giving Pranno and DiVito the Lansing sewer job he wanted $20,000 in cash. After looking at Evans' figures, DiVito told Pranno that there would be $20,000 in cash above Pranno's and DiVito's costs and profits for the job. Thereupon Pranno told Amabile that he would give him the $20,000 in cash and Amabile accepted the deal. Afterwards, Pranno told DiVito that Evans was Amabile's "guy" and that DiVito should never say anything in front of Evans because it would get back to Amabile.

La-Key testified that he attended a September meeting at Amabile's apartment with Evans, DiVito and Amabile. Amabile said that he was giving the Lansing sewer job to DiVito and Pranno and cared about nothing except getting his $20,000 "off the top." In La-Key's presence, DiVito later relayed the message to Pranno about Amabile's demand for $20,000. Pranno directed La-Key and DiVito to meet with Amabile and Evans at the El Morocco lounge. At that meeting DiVito told Amabile that there would not be enough money in the contract to pay him $20,000 "off the top." Amabile then instructed Evans to figure a way to obtain more money from the job. Evans tore up the original contract and wrote a new contract, raising the price from $150,000 to $199,600.

Pranno gave DiVito and La-Key approximately $13,000 to open a bank account for Carlson. In September 1964, Evans advised Riley that he had selected the Carlson Construction Company as the sewer contractor, that its reputation was excellent, and that it was operated by Henry La-Key. Thereafter, Carlson Construction Company was awarded the sewer contract for about $150,000, to be paid directly to Carlson by a suburban savings and

[2] This may be the same Amabile apartment meeting described *infra* by La-Key.

loan association through pay-out slips issued by Riley's company. Carlson commenced the Lansing work in September or October 1964.

In mid-October, Evans told La-Key that the only contracts Evans let at Lansing were the ones Amabile told him to. Evans told La-Key that he did not want Riley to know that Evans knew Amabile. In November, Amabile told La-Key that Evans worked for Amabile, that Amabile had placed Evans in Riley's office, and that Evans would do whatever Amabile told him to do.

Before making the first draw from the savings and loan association, La-Key told Amabile that the draw would be for $57,000. The next day, Amabile and La-Key drove to the hospital where Evans was a patient. Amabile told La-Key that Amabile was going to give $5,000 to Evans as his cut on the job, instead of $7,500. At the hospital Amabile gave Evans a "wad of bills." Evans reduced the estimate for the first draw by approximately $10,000.

On November 12, 1964, La-Key received the first draw for $47,517.97 from the savings and loan association. He deposited $39,000 in Carlson's payroll account, retained $517 for his wages, and gave $8,000 to Rocco Pranno. Three days later, on Amabile's instructions, he drew out $20,000 from Carlson's account and gave it to Amabile.

In late November or early December, La-Key accompanied Amabile to a farm in Pingree Grove, Illinois, where Amabile introduced La-Key to Battaglia as "running the job for them" in Lansing, Illinois. La-Key heard Battaglia ask Amabile why Evans was getting "that kind of money." Amabile explained that he had made a deal with Evans who had "got us the job." Amabile also said he had promised Evans $7,500 and that he would take care of it. The next morning La-Key mentioned to Evans that he had been at Battaglia's farm, and Evans warned him not to talk about it. Later, Pranno explained to Amabile that La-Key should not have been taken to the farm. When

Pranno attempted to hit La-Key, Amabile stopped him, saying that he had La-Key down to the farm and that "the man [Battaglia] says he is OK."

Prior to the first draw, Pranno, DiVito and La-Key borrowed $5,000 because Carlson had run short of money. Pranno gave $4,500 of this amount to La-Key to deposit for Carlson. This loan was not repaid by January 1965. Later that month Pranno told Amabile about this in DiVito's presence and asked Amabile to locate La-Key so that the loan could be repaid. Several days later Pranno told Amabile that he was going to "the farm" to see "the man" in order to have Amabile obtain $5,000 from La-Key to pay back the loan. At the resulting Battaglia farm meeting, attended by Amabile, Pranno and DiVito, Pranno mentioned that $20,000 from the Lansing sewer job was intended for Battaglia, who then nodded. The second time the $20,000 was mentioned for Battaglia, he said "yes." Battaglia also said:

> " 'Well, I don't think Hank La-Key is such a bad guy, I like him, I like to work with him,' that they had other things coming up, and that they could use him again because he was clean."

He told Pranno that he would see what he could do for him as to the $5,000. On the drive back from the farm, Pranno told DiVito that he thought Amabile was short-changing Battaglia and keeping $10,000 of the $20,000 for himself.

In January 1965, La-Key advised Evans that Carlson did not have enough money to pay for necessary materials. Evans told La-Key not to worry, saying:

> " 'I will talk to Joe Shine [Amabile] and Joe Shine will talk to the man [Battaglia or Riley[3]]. We will see that the money is in the bank for you.' "

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[3] In other instances in the record, the evidence supports a finding that the expression "the man" refers to defendant Battaglia.

That same month Amabile told La-Key to prepare the papers for the second draw. La-Key said that the second draw would be for $60,000. Amabile said this was too high and that he would determine how much it should be and would straighten it out with Evans. That same night, Evans went to La-Key's home and changed prices to bring the draw down to $48,000. Evans told La-Key to present the second draw papers to Sol Meltzer, Riley's financial officer. However, Meltzer refused to authorize this draw. Thereupon, La-Key went to see Amabile. Evans was present while La-Key told Amabile what had happened. The next morning La-Key picked up Evans. They entered Riley's office separately. Riley said that he would authorize a pay-out only when Carlson had paid its suppliers. At this meeting La-Key told Riley that the cost of the job had gone up to $200,000. Evans explained that this was because "complications set in on the job."

La-Key thereupon reported to Amabile that the second draw was still not authorized. Amabile told La-Key to accompany him to Riley's office the next morning. On the following day Amabile told Riley that he had to pay La-Key because "the man" [Battaglia] wanted La-Key paid. Amabile said that otherwise there would be "all sorts of trouble." Because of his fear of physical harm and economic collapse, Riley authorized the second draw of $48,512.48. This was the sum mentioned in the indictment and was deposited by La-Key in a Carlson account. A few days later, Amabile instructed La-Key to draw out $17,000. La-Key thereupon obtained $5,000 in cash and a certified check for $12,000. Amabile insisted upon all cash and ordered Evans to accompany La-Key to cash the check. After the $12,000 check was cashed, La-Key and Evans went to Amabile's apartment, and La-Key gave Amabile the $17,000. Amabile then gave La-Key $5,000, of which La-Key gave Evans $1,000. Amabile told La-Key to take a vacation, and he went to Florida. Shortly thereafter, Evans advised La-Key to return to Chicago, at

Amabile's request. Amabile then complained that La-Key had not been paying Carlson's bills, thus getting Amabile in trouble with Riley and " 'making Dave Evans lose his job. You are taking my man [Evans] right out of Riley's.' " La-Key then told Amabile that there was no money in the Carlson account because Amabile had bled it.

A few days later, La-Key complained to Evans that the Carlson bills were unpaid because of Amabile's actions. La-Key asked Evans why he didn't get out of the business. Evans replied:

> " 'I can't get out. I am in too deep with Joe Shine [Amabile]. I know too much about the other people. * * * I can't quit. I wish I could get back to my own job where I came from.' "

Evans then said that he wished he had never met Amabile and reiterated that he was in too deep to quit.

Sufficiency of the Evidence as to Evans

Evans and Battaglia concede there was enough evidence of a conspiracy to obtain money from Riley Management Corporation by fraud. Evans admits that there was sufficient evidence that he was a party to that conspiracy. He also admits that Amabile used extortion to induce Riley to authorize the second draw. However, Evans contends that there is no evidence to show that the extortion was pursuant to a conspiracy of which he was a member. We reject that contention.

On this record, it is obvious that Evans knew of Riley's fear of Amabile. Although Evans took the stand, he significantly never explained that violence was not contemplated. La-Key was told by Evans that he would talk to Amabile, and that Amabile would talk to "the man" (Battaglia or Riley in this instance; see note 3 *supra*) in order to get the second draw paid. Evans knew that

Riley was unwilling to pay the second draw because Carlson's bills were unpaid, and that Riley was afraid of Amabile. The jury could properly infer that Evans knew Amabile would induce Riley—through fear—to authorize the second draw. After the second draw, La-Key withdrew another $17,000 for Amabile, who then gave La-Key $5,000, who in turn gave Evans $1,000.[4] Even though he may not have spoken to Amabile about the second draw, Evans' own statement to La-Key showed his willingness to take part in a course of action which would cause payment by coercion. It would be unreasonable to suppose that Evans would be so closely associated with Amabile in the scheme to defraud without realizing that Amabile would employ coercive means for obtaining the second draw. Cf. *Pereira* v. *United States,* 347 U.S. 1, 12-13. As in *Lefco* v. *United States,* 74 F.2d 66, 68, 69 (3rd Cir. 1934), Evans has resorted to a conspirator's common contention, made in extremity, that he was a party to a sub-conspiracy not charged in the indictment, but our digest of the evidence discloses evidence quite sufficient to sustain the allegations and finding of his participation in a single conspiracy to obtain money, encompassing extortion as well as fraud.

Evans has relied on *Stirone* v. *United States,* 361 U.S. 212; *United States* v. *Critchley,* 353 F.2d 358 (3rd Cir. 1965), and *Carbo* v. *United States,* 314 F.2d 718 (9th Cir. 1963), certiorari denied, 365 U.S. 861. None is apposite. In *Stirone,* the Court condemned the variance between indictment and proof. As we have seen, the proof here is consistent with the indictment. In *Critchley,* the evidence did not show any threat at the critical time, so that there was no extortion. Here there was ample evidence that co-conspirator Amabile threatened Riley with violence to obtain the second draw, and of course Evans is chargeable with his co-conspirator's acts in furtherance of the

[4] Previously, according to La-Key, Evans had received another "wad of bills" from Amabile.

conspiracy.[5] In *Carbo,* Gibson had legitimate business reasons for his association with the conspirators, whereas Evans' associations with Amabile were clearly for illegal purposes.

Sufficiency of the Evidence as to Battaglia

As noted above, during DiVito's, Pranno's and Amabile's February (or early March) 1965 visit to Battaglia's farm, Battaglia said he liked La-Key and they could use him in other things because he was clean. From this, the jury could infer that Battaglia had embarked "on a criminal venture of indefinite outline" (*United States* v. *Andolschek,* 142 F.2d 503, 507 (2d Cir. 1944)). He was committed to a long-term relationship contemplating the use of La-Key in numerous ventures. Battaglia admitted knowledge of Evans' paid role. He also acknowledged that he was to receive a $20,000 cut from Riley through the Carlson contract at Lansing. Since Battaglia had a stake in the outcome of the conspiracy, even the stringent test of conspiracy liability evolved by Judge Learned Hand in *United States* v. *Falcone,* 109 F.2d 579, 581 (2d Cir. 1940), affirmed, 311 U.S. 205, was satisfied. Battaglia was also the arbiter of disputes among the co-conspirators. Being an associate of Amabile in this venture, Battaglia is properly chargeable with knowledge that his confederate, Amabile, would resort to threats if necessary to extract money from Riley. Battaglia had to "take his chances" as to the methods used by the other co-conspirators. *United States* v. *Andolschek, supra.* As in *United States* v. *Kahaner,* 317 F.2d 459, 468, note 4 (2d Cir. 1963), certiorari denied, 375 U.S. 835, 836, "there was ample evidence to raise a question for the jury whether he had joined in the conspiracy; if the jury so found, he [a co-conspirator who held the bribe money] was criminally responsible for the acts of the other conspirators

[5] *United States* v. *Sansone,* 231 F. 2d 887, 892 (2d Cir. 1956), certiorari denied, 351 U.S. 987.

and his own failure to perform more than a few overt acts would be immaterial." Evidence of knowledge of the details of the plan or of participation of others is not required. *United States* v. *Hickey,* 360 F.2d 127 (7th Cir. 1966), certiorari denied, 385 U.S. 928.

Intent to Affect or Knowledge of Effect on Interstate Commerce

Battaglia insists that it was necessary to find that he intended to affect or had knowledge that the conspiracy would affect interstate commerce, and that there was insufficient evidence of such intent or knowledge. A similar argument was rejected in *United States* v. *Varlack,* 225 F.2d 665, 672 (2d Cir. 1955). As we recently held in *United States* v. *Pranno,* .. F.2d .. (7th Cir. 1967):

> "All that must be proved, however, is that defendants conspired to commit extortion, and that the natural effect of carrying out their threat, whether they were conscious of it or not, would affect commerce."

The District Court charged the jury that "all that is necessary is that the natural effect of the acts committed pursuant to the conspiracy was to affect, delay or obstruct [interstate] commerce," and that the requisite effect on commerce would be found if the jury believed "beyond a reasonable doubt that the defendants' activities as shown by the evidence in any way or degree obstructed, delayed or affected commerce." These instructions were proper under the Hobbs Act. Neither Battaglia nor Evans argues that the extortion would have no effect on interstate commerce. Here, one of the means to accomplish the extortion was the threat otherwise to cause Riley Management Corporation "all sorts of trouble." Many interstate deliveries were being made to its Lansing project. If Amabile's threats to destroy Riley had been carried out, this interstate commerce would necessarily have been obstructed. The Hobbs Act covers such a situation.

United States v. *Pranno, supra.* Furthermore, the Riley company's reserves were depleted by the extortion. Since its business depended, in part, on ability to pay for interstate shipments to the Lansing site, the jury could infer that the extortion would have an effect on interstate commerce. Under the language of this statute (see note 1 *supra*), that is a sufficient nexus with interstate commerce.

Denial of Bill of Particulars

Evans' briefs do not contest the denial of requests Nos. 2 and 3 in his motion for a bill of particulars.[6] However, Battaglia adopted these requests and argues that the District Court erroneously denied them. Specifically, Battaglia asserts that he was entitled to information about the 1962 and 1963 Palermo-Amabile threats to Riley with respect to his Northlake and Westmont, Illinois, projects. However, requests Nos. 2 and 3 provide:

> "2. State the acts or things done by the petitioner [Evans and, by adoption, Battaglia] by which he and the other named and unnamed persons, combined, confederated and agreed together to obstruct, delay and affect commerce as charged.
>
> "3. State the dates, times and places when and where the alleged acts set forth in paragraph 2 above were done or performed."

Even if the District Court had ordered the Government to answer these requests, the Palermo-Amabile threats would not have been revealed. Since Battaglia did not ask for this information below, he may not assert error in this respect. Furthermore, none of the *five* requests in the motion for a bill of particulars covered this subject matter. Therefore, the Government was not required to respond as to it. No abuse of discretion has been shown

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[6] The other three requests were granted and the Government answered them.

with respect to the partial denial of this motion. *Wong Tai* v. *United States*, 273 U.S. 77, 82.

Conspiracy Instruction

During the early portions of the trial, the District Court refused to permit the Government to have the defendants' declarations considered against all of them. Later in the trial, upon motion of the Government, the Court instructed the jury as follows:

> "Before we proceed with the taking of further testimony in this case, I have a direction and instruction to give you, to make to you.
>
> "You will recall during the course of this trial certain testimony was admitted in evidence only as to one or more of the defendants, and you were instructed at that time that such evidence was not then to be considered against any defendant to whom the evidence did not pertain.
>
> "It is now my responsibility, under the law, to instruct you that such evidence is admissible against all of the defendants as evidence in connection with the alleged conspiracy charged in the indictment, whether or not each of the defendants was present when the acts or conversations or incidents testified about were done or carried on.
>
> "You may consider then such evidence as pertaining to all of the defendants."

Citing *United States* v. *Pronger*, 287 F.2d 498 (7th Cir. 1961), Battaglia complains that this instruction was a direction to the jury that a conspiracy had been proven and that each defendant was a member of that conspiracy. However, the last paragraph of this instruction referred to "the alleged conspiracy" and did not tell the jury that the Government had proved a conspiracy. A later

instruction made it plain that the jury could not consider acts and declarations of one conspirator against the others unless the jury found the existence of a criminal conspiracy and that the acts and declarations were in furtherance of the conspiracy.

The *Pronger* case is not controlling here. The terms of the instruction in that case were dissimilar to those here, and any defect in that instruction was apparently not cured by a later instruction. Conspiracy instructions similar to those here were approved in *United States* v. *Bernard*, 287 F.2d 715, 719-20 (7th Cir. 1961), which reinforces our conclusion that the later instruction made the risk of prejudice too slight to justify reversal. *Pronger* has been confined to a situation where the erroneous instruction was in effect given as part of the charge and does not apply where, as here, trial time intervened between the ascribed comments and the final, proper charge. *United States* v. *Allegretti*, 340 F.2d 254, 256 (7th Cir. 1964, *en banc*), certiorari denied, 381 U.S. 911.

Battaglia claims that the jury was not told that it could not consider acts or declarations of a co-defendant made outside the presence of a defendant against the absent defendant unless it found that a conspiracy existed and that the acts and declarations were in its furtherance, but an examination of the transcript shows that such an instruction was given.

Admission of Pre-indictment Threats Made by Amabile and Palermo and Admission of Statements of Co-conspirator Pranno

Battaglia also asserts that the District Court erroneously admitted Riley's testimony of 1962-1963 threats by Amabile and Palermo and erroneously admitted Pranno's statements outside the presence of the defendants. We agree with the Government that the Palermo-Amabile threats were relevant to show the reasonableness of Riley's fear when confronted with Amabile's demand to authorize the second

draw. The District Court carefully instructed the jury that this testimony was limited to that purpose (Tr. 2564).

As to Pranno, the evidence concerning his January 1965 visit to Battaglia's farm, as well as other evidence previously summarized, shows that he was a co-conspirator of Battaglia and Amabile, so that La-Key's and DiVito's testimony concerning Pranno's statements outside the presence of defendants was properly received.

Accomplice Instruction

Battaglia complains that the District Court's accomplice instruction advised the jury that DiVito and La-Key were accomplices. The instruction was as follows:

> "I must tell you, ladies and gentlemen of the jury, that an accomplice is one who unites with another person in the commission of a crime voluntarily and with common intent. An accomplice does not become incompetent as a witness because of participation in the criminal act charged. On the contrary, the testimony of an accomplice alone, if believed by you, may be of sufficient weight to sustain a verdict of guilty even though not corroborated or supported by other evidence. However, you should keep in mind that such testimony is to be received with caution and weighed with great care. You should not convict any defendant upon the unsupported testimony of an accomplice unless you believe the unsupported testimony beyond all reasonable doubt."

This instruction does not say or imply that DiVito and La-Key were accomplices. The instruction obviously means that if a person is found to be an accomplice, his testimony should be scrutinized with special care. A similar instruction has been proposed by Judge Mathes for the use of the District Courts. 20 F.R.D. 244. Such cautionary instructions were advocated in *United States* v. *Bucur*, 194 F.2d 297, 305 (7th Cir. 1952); *Wainer* v.

United States, 82 F.2d 305, 308 (7th Cir. 1936), affirmed, 299 U.S. 92, and *Ruvel* v. *United States*, 12 F.2d 264, 265 (7th Cir. 1926). Battaglia relies on *United States* v. *Balodimas*, 177 F.2d 485, 487 (7th Cir. 1949), but there the district judge termed two named witnesses as accomplices. Here the jury had already been instructed that it was the exclusive fact finder, and there was sufficient evidence from which the jury could find that La-Key and DiVito were accomplices of the defendants. In this setting, the giving of this instruction was not erroneous.

Restriction of Cross-examination and Refusal to Admit Defense Exhibits

Battaglia assails the District Court's rulings restricting the cross-examination of DiVito, La-Key and Riley; he also assails the court's refusal to receive certain defense exhibits. A study of the cross-examination of these witnesses shows that the District Court allowed defense counsel considerable latitude.

Battaglia's counsel attempted to show that a tax indictment had been dismissed against DiVito in return for his agreeing to be a government witness in this case. Battaglia's counsel cross-examined DiVito extensively about a "deal" to drop the income tax charge if DiVito testified for the Government in the instant case. Later the First Assistant United States Attorney in Chicago testified that the reasons for the Government's dismissal "were that Mr. DiVito's lawyer served us with that motion showing that he had paid his taxes, attaching the check and the receipt and it was obvious that we had no case * * *."[7] He also testified that the Assistant United States

[7] By allowing this testimony, the trial judge acted consistently with the rule that bias or interest of a witness is not a collateral issue, and that extrinsic evidence is admissible thereon. *United States* v. *Lester*, 248 F.2d 329, 334-335 (2d Cir. 1957); 3 Wigmore on Evidence (3rd ed. 1940) §§ 948-950, 1005(b); McCormick on Evidence (1954) § 40, pp. 85-86.

Attorney in charge of the DiVito case was satisfied that proof the tax had been paid in 1964 was a defense to that indictment. If Battaglia's counsel was still not satisfied why the DiVito indictment was dismissed, he could have also called the Assistant United States Attorney in charge of that matter.

The District Court refused to permit the defense to put into evidence the court file and docket entries relating to DiVito's tax case, but they were merely cumulative and did not reveal any "deal." Hence their exclusion was not prejudicial to Battaglia.

Battaglia endeavored to show that La-Key was responsible for the milking of the Carlson Construction and Equipment Company. The defendants were given ample opportunity to examine La-Key regarding the balances in the Carlson bank accounts. The District Court did sustain the Government's objection to certain checks. But Battaglia was not prejudiced by this ruling, for the checks were already reflected by ledger sheets that had been received, thus enabling Battaglia's counsel to argue that La-Key had looted the Carlson Company for his own personal gain. In addition, the checks were being offered in an attempt to contradict a witness on a collateral matter not relating to the $48,500 allegedly extorted. This is impermissible. *United States* v. *Masino*, 275 F.2d 129, 133 (2d Cir. 1960); *United States* v. *Sweeney*, 262 F.2d 272, 276-277 (3rd Cir. 1959). 3 Wigmore on Evidence (3rd Ed. 1940) § 979. Prior contradiction may be shown only on a matter material to the substantive issues of the trial. *Gordon* v. *United States*, 344 U.S. 414, 420, note 13. As noted there, a trial judge has "wide latitude in control of cross-examination, especially in dealing with colateral evidence as to character." 344 U.S. at p. 423.

Next, Battaglia states that he was precluded from showing Riley's purchase price for the Lansing land. It is true that the real estate contract was not admitted by virtue

of the best evidence rule. But earlier Battaglia had shown through Robert Biederman's testimony that the price was about $140,000. Since the disparity between the purchase price and the price used in loan negotiations was already in the record, no prejudice stemmed from this ruling.

Battaglia complains too that Riley's February 5, 1960, bankruptcy petition should have been admitted. Again, the District Court had broad discretion to refuse it as a collateral matter. *United States* v. *Bender,* 218 F.2d 869, 874 (7th Cir. 1955), certiorari denied, 349 U.S. 920. Riley's bankruptcy petition supposedly stated that he owned no stocks or bonds as of that date, but this record does not show that the bankruptcy statement was "obviously perjured" as Battaglia claims. No abuse of the District Court's discretion has been shown in this exclusionary ruling.

Battaglia complains that in Amabile's cross-examination of Riley, Amabile was not permitted to show that Riley's October 5, 1965, statement to the Federal Bureau of Investigation did not refer to the 1962-1963 threats of Palermo and Amabile. However, Riley testified that he had advised the FBI of these threats and added: "I have only read two pages [of the October 5 statement] and I see it in there, yes, sir." If Battaglia's counsel considered the point worth pursuing, he could have called FBI agents Dahlman and Kotsos to prove the contrary. *United States* v. *Borelli,* 336 F.2d 376, 391 (2d Cir. 1964), certiorari denied, 379 U.S. 960.

In his reply brief, Battaglia's counsel contends that the Government should have granted his request for production of DiVito's grand jury testimony.[8] No particularized need for this testimony was shown, nor was there any showing that the ends of justice required production.

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[8] Battaglia's counsel did not request the production of La-Key's and Riley's grand jury testimony.

Therefore, production was unnecessary. See *Dennis* v. *United States*, 384 U.S. 855, 868-875.

As to Battaglia's principal cases cited to show reversible error, in *Alford* v. *United States*, 282 U.S. 687, defense counsel was not permitted to establish that a prosecution witness was in government custody and therefore might expect consideration. In this case, the defense was permitted to show that both DiVito and Riley were in government custody. In *Spaeth* v. *United States*, 232 F.2d 776 (6th Cir. 1956) and *United States* v. *Hogan*, 232 F.2d 905 (3rd Cir. 1956), the defense sought to cross-examine government witnesses who stood convicted of a federal offense, in an effort to show that they expected leniency in return for their testimony. The District Court refused to allow such cross-examination. In this case, Battaglia's counsel subjected DiVito to a lengthy cross-examination about the reasons for the dismissal of the tax evasion indictment against him. This also serves to distinguish *United States* v. *Masino*, 275 F.2d 129 (2d Cir. 1960), where such cross-examination of government witnesses was not permitted.

Gordon v. *United States*, 344 U.S. 414, *United States* v. *Beekman*, 155 F.2d 580 (2d Cir. 1946), and *Meeks* v. *United States*, 163 F.2d 598 (9th Cir. 1947) deal with the exclusion of documentary evidence showing that the prosecution witnesses had been punished for violating federal law and were still subject to the jurisdiction of the court or agency which had imposed the punishment. In each case, the information contained in the documentary evidence tended to prove bias and was not otherwise present in the record. In this case, the District Judge remarked at one point: "I assume that the government is the only one who could voluntarily move for the dismissal [of the tax indictment against DiVito]." This statement, coupled with the extensive cross-examination of DiVito and the examination of the First Assistant United States Attorney in Chicago, told the jury that the indictment had been dismissed on

motion of the government. Defendants do not show that any other significant information was contained in the excluded documentary evidence.

Gordon, Masino, and *Meeks* are further distinguishable because in those cases reversal was based on the cumulative prejudical effect of two or more errors. This case lacks at least one of the errors found in each of those cases.

We approve of the foregoing cases and of the policy of affording the defense wide latitude in showing bias. We do not view the disposition of the issues herein as inconsistent with them.

We have considered Battaglia's other points relating to cross-examination, exclusion of documentary exhibits and instructions and find them to be without merit. In closing this discussion, it should be noted that various criticized evidentiary ruling of the District Court were well within those approved in *United States* v. *Lawinski,* 195 F.2d 1 (7th Cir. 1952). Taken together, the evidentiary rulings here gave these defendants broader latitude than in *Lawinski* and do not amount to an abuse of discretion.

Evans' Character Witnesses

Evans was precluded from showing his good character through four acquaintances. Relying on *Michelson* v. *United States,* 335 U.S. 469, the District Court explained that his evidentiary rulings were based on improperly put questions and on improper foundation. As to some of the questions, this may have been an over-strict application of *Michelson.* However, no foundation was laid to show that these witnesses knew any of the people who lived in the community where Evans resided. Proof of reputation "among a limited group such as fellow employees in a particular building" has been held inadmissible. 335 U.S. at p. 481, note 17; *Williams* v. *United States,* 168 U.S. 382, 397; *Kroot* v. *United States,* 66 F.2d 449, 451 (7th Cir.

1933). Although a more liberal approach to character witness rulings has precedential basis, we adhere to Mr. Justice Jaskson's precept not to "disturb rulings of trial courts" in this troublesome field except in rare instances (335 U.S. at p. 480).

Restriction of Evans' Testimony

Evans argues that the District Court's evidentiary rulings during his testimony denied him an opportunity to present an adequate defense.

It is true that Evans was not permitted to deny certain secrecy admonitions supposedly made about the Lansing project during Riley's June 1964 conversation with Evans, but this was because of the leading and suggestive nature of his trial counsel's questions. To rebut secrecy, Evans' counsel was permitted to elicit that the Riley company had prepared a brochure to promote sales of the Lansing apartments, and that the Hammond *Times* published a story about the project in August 1964.

The rulings not permitting Evans to answer certain questions as to conversations with Amabile, La-Key, DiVito and Pranno were based on the improper form of the questions and lack of proper foundation. These rulings are supportable under rudimentary rules of evidence. Furthermore, Evans was permitted to deny that he met with those persons after his counsel rephrased his questions.

As to the bid sheets, Evans was allowed to testify that there were a signed original and a signed copy of the sewer contract bid sheets, and that the signed original was left in Riley's office, the very points his trial counsel was attempting to elicit.

Since Evans was charged with a January 1965 conspiracy, we cannot state that it was erroneous for the District Judge to consider irrelevant whether Riley held Evans in high esteem in August 1965.

Our study of Evans' testimony shows that he was given great scope in presenting his denials of any part in the conspiracy. The District Court's exclusionary rulings did not jeopardize his defense and were permissible interpretations of the law of evidence.

Evans' Counsel's Inability to Comment on Battaglia's and Amabile's Failure to Testify

Before the defendants presented their witnesses, the District Court instructed their counsel not to refer to the failure of any of the defendants to take the stand. This instruction was of course to protect the Fifth Amendment rights of the two silent defendants, Battaglia and Amabile. The defenses of the three accused were not mutually exclusive. Also, Evans' counsel's closing argument took advantage of Evans' having taken the stand. There was no "showing that real prejudice will result from the defendant's inability to comment" (*United States* v. *Kahn,* 381 F.2d 824, 840 (7th Cir. 1967), certiorari denied, 36 U.S. Law Week 3251), so that severance was not necessitated.

Trial Publicity

Even though defendants successfully objected to sequestering the jury, Battaglia now argues that prejudicial publicity violated his due process rights. In closing argument, his counsel recognized that the trial court repeatedly admonished the jury to ignore news coverage. There is no claim that any jurors read any of the "prejudicial" articles, thus differentiating the case from *Marshall* v. *United States,* 360 U.S. 310. In *Janko* v. *United States,* 366 U.S. 716, the second conviction was reversed because the trial court had not inquired whether the jurors had read a St. Louis *Post-Dispatch* article published during the trial and containing "inadmissible prejudicial information."[9] Here

[9] See Solicitor General's Memorandum filed in the Supreme Court in the *Janko* case.

the jurors were twice asked whether they had seen articles about the case. None admitted having done so. *United States* v. *Accardo,* 298 F.2d 133 (7th Cir. 1962), and *United States* v. *Largo,* 346 F.2d 253, 256 (7th Cir. 1965), certiorari denied, 382 U.S. 904, do not hold that the District Court must always interrogate each juror singly. See *United States* v. *Jannsen,* 339 F.2d 916, 919-920 (7th Cir. (1964).

Battaglia also complains of the presence of a permanent press table inside the bar.[10] The Supreme Court has recently emphatically disapproved of such an installation (*Sheppard* v. *Maxwell,* 384 U.S. 333), so that the District Judges should consider reserving the bar of the court for counsel in the future (384 U.S. at p. 355). However, we do not consider the placement of this press table to constitute reversible error, for this record reveals no "frequent confusion and disruption of the trial" or "constant commotion within the bar" (384 U.S. at p. 355). In our view, the intrusion of the news media into this trial was not so great as to obviate a showing of prejudice (cf. *Estes* v. *Texas,* 381 U.S. 532 and *Sheppard* v. *Maxwell,* 384 U.S. 333). Battaglia has failed to satisfy us that he was denied a free trial because of adverse publicity.

Eavesdropping

The Government's brief reprints an August 18, 1967, letter from the Assistant Attorney General in charge of the Criminal Division of the Department of Justice to the United States Attorney in Chicago. The letter confirms the Department's pre-trial advice to the United States Attorney that there was no electronic monitoring in this case. Cf. *Hoffa* v. *United States,* 387 U.S. 231. Accordingly, it is now academic whether the District Court should

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[10] Such tables have been installed in the various trial courtrooms in the Northern District of Illinois.

have granted a hearing to determine whether electronic eavesdropping had taken place.

No prejudicial error having been shown, the two judgments are affirmed.

SWYGERT, *Circuit Judge,* dissenting. This dissent is based on two independent grounds. First, I do not believe that the Government introduced evidence sufficient to convict Battaglia and Evans of the crime charged against them. Second, although my views on the sufficiency of the evidence would dictate a reversal without remand, a multitude of prejudicial errors occurred which in combination, if not singly, precluded the defendants from receiving a fair trial. Consequently, on the basis of these trial errors, the case should be remanded for a new trial regardless of the insufficiency of the evidence.

I.

SUFFICIENCY OF THE EVIDENCE.

Accepting the evidence in the light most favorable to the Government, the evidence unquestionably showed that Amabile, Pranno, DiVito, Evans, and LaKey devised and executed a scheme to defraud the Riley Management Corporation by using the Carlson Construction & Equipment Company as a facade so that moneys meant for construction purposes could be diverted to those participating in the scheme. But this scheme was not the one charged in the indictment. The evidence also unquestionably showed that Amabile threatened Riley for the purpose of obtaining money. The record is barren, however, of any evidence, direct or circumstantial, to sustain the charge that Battaglia and Evans conspired with Amabile "to obstruct, delay and affect commerce" in the movement of materials for the construction of the Riley dwelling units by means of extortion.

In early 1964, the Riley Management Corporation began planning the construction of an apartment building at Lansing, Illinois. In June of that year, William Riley, president of the Riley company, requested his construction superintendent, Dave Evans, to start lining up contractors for the Lansing project, but asked Evans to keep the project "secret from Joe Shine [Amabile] and Nick Palermo." A few days later Riley, at Amabile's request, met Amabile and Palermo at the latter's Melrose Park plumbing company office. Riley testified concerning this meeting:

> Nick Palermo asked me if I was going to build a project in Lansing, Illinois. I told Mr. Palermo that I was and Mr. Palermo asked me when he was going to get the blueprints so that he could figure the work. I told Mr. Palermo that I did not plan on giving him the work. I told Mr. Palermo that he was behind on his existing projects and with the efficiency that we we now enjoying, it was ridiculous to give him this project.
>
> Joe Shine told me that I wasn't going to give it to anyone else other than them and they asked me basically what the hell I was trying to pull, . . .
>
> * * *
>
> Joe Shine told me that if I didn't give them the work in Lansing, that he would stop the project in Northlake and in Westmont, Illinois. They told me that I had to use them, that if I didn't use them, that they would put me out of business. I told Nick and Joe that they were now in the process of putting me out of business, the way they were doing it. I was told not to be a smart punk.
>
> Joe Shine told me I shouldn't be a wise guy. Joe Shine told me he knew how to handle wise guys and that I would be walking the streets with a candy cane.
>
> * * *

> Joe Shine told me he knew where my mother lived. He would—he told me that he knew where my kids went to school and they had a baseball bat to handle wise guys like me.

After this meeting, Riley gave Palermo the plumbing contract for the Lansing project.

In late July or early August 1964, Amabile met Mike DiVito, a sewer contractor, and Rocco Pranno in the latter's D'Or Supper Club in Stone Park, Illinois. Upon learning from Amabile about the Riley project in Lansing, DiVito asked if he could obtain some of the sewer work. Amabile said "it was possble," but that he didn't want DiVito's name on the contract. A few days later Amabile told DiVito and Pranno that if they came up with "a good clean fellow," they could get the sewer contract for the Lansing project. Shortly after this conversation, DiVito and Pranno persuaded Henry LaKey (who had been a foreman on sewer construction jobs) to work for them if they succeeded in getting the Lansing contract.

In mid-September, DiVito, Pranno, Evans, and Amabile met in the latter's apartment in Northlake, Illinois. Pranno told Amabile that he and DiVito "had a fellow to do the work for us called Hank LaKey and that he was clean." Amabile replied, "Okay, that's fine . . . [but] before I give you this job, I want $20,000 in cash."

During this period, DiVito and Pranno hired LaKey to work for them for $200 per week plus a ten per cent bonus upon completion of the job. They told LaKey they were starting a "new corporation" to be called the Carlson Construction & Equipment Corporation and they would like to have him put "on the paper as president" of the company. In contemplation of giving the sewer work to DiVito and Pranno, Evans apparently drafted a written contract to be signed by Carlson Construction. The contract that Evans originally drew up, however, was un-

satisfactory to DiVito and Pranno because they had decided, after looking over the plans, that there would be insufficient proceeds from the job to pay Amabile the twenty-thousand dollars he had demanded "off the top." At this point, Amabile told Evans to figure a way to get more money out of the job. Evans rewrote the contract raising the price approximately forty to forty-five thousand dollars. After looking at the plans and specifications and seeing the high price of the job pursuant to the rewritten contract, DiVito informed Pranno that "there would be $20,000 in cash above our costs and profits." Pranno then told Amabile in the presence of DiVito and Evans that he would give him the twenty thousand dollars. Amabile replied "Okay, it's a deal." In accordance with their previous discussion, Pranno, DiVito, and LaKey formed the Carlson Construction & Equipment Company. DiVito and Pranno each received forty-five per cent of the stock and LaKey the remaining ten per cent.

Sometime in September, Riley asked Evans whether he had lined up a sewer contractor. Evans said that he had obtained an excellent contractor, Carlson Construction, operated by a man named LaKey. Evans told Riley that he "had looked into Carlson Construction's reputation, it was excellent, and . . . [he] felt quite confident that this man could do a good job." Carlson Construction was given the contract under an arrangement whereby Lawn Savings & Loan Association was to pay Carlson upon receipt of payment slips issued by the Riley company. Carlson Construction commenced the sewer work in September or October, 1964.

Early in November, Amabile instructed LaKey to get the necessary papers ready for making the first "draw." After preparing the papers, LaKey went to see Amabile at the El Morocco, a night club operated by Amabile in Northlake, Illinois. LaKey testified: "Joe Shine [Amabile] asked me how much the draw was for. I told him $57,000.

. . . Joe Shine said he would get a hold of Dave Evans and straighten this out." Within a day or two, LaKey and Amabile went to see Evans, who was a patient in Illinois Masonic Hospital. Before they saw Evans, Amabile told LaKey that Evans was going to receive $5,000 as his cut, not $7,500 as originally planned. At the meeting, Amabile gave Evans a "wad of bills." Evans then looked over the papers for the first draw and crossed out a number of items. After the papers had been retyped, reflecting a reduction of $10,000 in the draw, Evans approved the papers and told LaKey to take them to Riley's office. On November 12, LaKey received a check for $47,517.97 from Lawn Savings & Loan Association based on a pay-out slip approved by Sol Meltzer, Riley's comptroller. LaKey deposited $39,000 in the Carlson Construction payroll account. Of the remaining $8,517, LaKey retained $517 and gave Pranno $8,000. Three days later, at Amabile's direction, LaKey withdrew $20,000 in cash from the Carlson Construction account which he gave to Amabile.

In January 1965, Amabile told LaKey to prepare the papers for a second draw. LaKey got the papers ready and showed them to Amabile who asked how much the draw was for. LaKey replied, "$60,000." Amabile thought that this figure was too high, saying, "I don't want that kind of money taken out of the account at this time. . . . I will tell you what to draw." He also said that he would straighten it out with Evans. That same day, Evans reduced the figure to $48,000 and, after approving the papers, told LaKey to present them to Meltzer for the payment slip. When LaKey presented the papers covering the second draw for approval, Meltzer refused to authorize the request.

LaKey immediately went to see Amabile, relating in Evans' presence what had happened. At Amabile's instruction, Evans and LaKey went to see Riley the next day. Pursuant to Evans' request, however, they entered

the office separately. When LaKey told Riley that he was there to get the second draw, Riley replied that Carlson Construction's bills were not being paid, and that he would authorize a payment only when LaKey had satisfied these obligations. During the conversation, LaKey told Riley that the cost of the job had gone up from $120,000 to $200,000. When Riley asked Evans to explain why the price had been increased, Evans told Riley, "There's complications set in on the job and we had to raise the price up to get the job done."

LaKey reported to Amabile that Riley had refused to authorize the second draw. Amabile replied: "You be here tomorrow morning. I'll personally go with you to the office myself. I'll get this straightened out once and for all." The next morning LaKey and Amabile arrived at Riley's office and walked in unannounced. Amabile asked Riley why he did not pay LaKey. Riley said he couldn't authorize the draw until LaKey had paid his bills. Amabile then told Riley: "I don't care nothing about that. The man's got his money coming, Bill, I want you to pay his money." At that point, Amabile and Riley went to the back of the office and commenced a conversation during which LaKey "seen a lot of arms moving by Joe Shine," who was doing most of the talking. Then Amabile walked towards LaKey, gave him a wink, laughed, and said, "You'll get your money now." Before leaving, Amabile turned to Riley and said: "Don't forget, Bill, I want you to pay this man. I want you to pay him now. You know what I mean." On the way back to the El Morocco, LaKey asked Amabile how he was able to tell "a big man like Riley" what to do. Amabile put up his fist and said, "I got this son of a bitch right here, . . . He's afraid of me."

On the witness stand, Riley gave this version of the meeting:

> Mr. Shine told me that I had to pay this man, that this man was a friend of theirs; that I was expected

to pay them; that if I didn't pay them all sorts of people would get mad.

I told Joe that it would be foolish for me to make this payment; that they were just pushing this company to ruination; that it just was absolutely ridiculous to pay this man and that I did not want to pay him.

* * *

Mr. Shine told me that I had no choice on this matter; that I had to pay this man; that the man wanted him paid.

I told him that this was silly. I had a big loan pending with Equitable Life and this thing would, it could destroy everything that we were trying to build up. I told him that, in fact I begged him not to have to pay him. He told me that I had to pay him.

* * *

He told me the man said I had to pay him and he told me if I didn't pay him there would be all sorts of trouble, and there was no sense in me making this trouble for myself so I better pay him because he was a friend of theirs.

Riley further testified that he subsequently authorized the payment because he was afraid; that he had been subjected to previous threats of physical harm to his family and his employees and ruination of his company by Amabile and Nick Palermo. Shortly after this meeting, LaKey deposited a $48,512.48 check, received from Meltzer, in the Carlson Construction bank account. Later Amabile told LaKey to withdraw $17,000 from the account. Of this amount, Amabile gave LaKey $5,000; LaKey in turn gave Evans $1,000.

A close analysis of the evidence in this case is essential to determine whether the Government proved the crime

charged. The precise charge was a conspiracy to extort money from Riley. The gist of the crime of conspiracy is an agreement between two or more people, rather than the resultant action undertaken pursuant to the agreement. Since the agreement is the gist of the crime, the agreement itself must be proved either by direct or circumstantial evidence. If circumstantial, the circumstances must be such as to warrant the jury in finding that the alleged conspirators had "some unity of purpose, some common design and undertaking, some meeting of minds in an unlawful arrangement. . . ." *Shannabarger v. United States,* 99 F.2d 957, 961 (8th Cir. 1938).

The conspiracy charged in this case was allegedly aimed at obstructing and delaying the interstate movement of materials and supplies required for Riley's Lansing project. That obstruction and delay was to result from the extortion of $48,500 from the Riley Management Corporation by engendering fear of bodily and economic injury in William Riley.

There is a substantial question concerning the admissibility of many statements testified to by DiVito, LaKey, and Riley, which were neither relevant to the crime charged nor binding on absent alleged coconspirators. Assuming for the sake of argument, however, that all their testimony was relevant and admissible, I still do not believe that the evidence shows either that Evans agreed with Amabile and Pranno or that Battaglia agreed with Amabile and Pranno to commit the extortion charged in the indictment.[2]

The evidence with regard to Evans shows that the only agreement or "common design and undertaking" to which he was party was one to bilk the Riley company by means of fraud and deceit out of money earmarked

[2] There was no proof that Evans and Battaglia had any connection with each other except through common acquaintance with Amabile, DiVito, Pranno, and LaKey.

for the Lansing job. Consistent with a scheme to defraud, DiVito and Pranno kept in the background, Amabile expressly ordering DiVito to stay off the job. A "good, clean fellow," LaKey, was recruited to act through the facade of Carlson Construction. There was constant effort among the conspirators to make sure that Riley was kept in the dark about Amabile's connection with Carlson Construction. Both draws were misrepresented to Riley as being legitimate expenditures. All these facts, as well as many others in the record, are indicia of fraud rather than extortion. Fraud is marked by misrepresentation, deception, and deceit. Extortion is direct and brutal—the very antithesis of fraud.

The Government argues that the most conclusive direct evidence showing Evans to be a "willing participant" in the conspiracy is a statement made by him to LaKey when LaKey expressed anxiety about paying his bills. Evans said: "I will talk to Joe Shine and Joe Shine will talk to the man. . . . We will see that the money is in the bank for you." (This statement was made in January 1965, after the first draw and after Amabile had gotten his $20,000 "off the top.") Subsequent to Evans' statement, arrangements were undertaken for the second draw. Again attempts were made to deceive Riley. Evans decreased the amount of the draw prepared by LaKey. When LaKey failed to get the draw approved, Evans accompanied LaKey to Riley's office, but by prearrangement they entered the office separately. Evans told Riley on this occasion "there's complications set in on the job and we had to raise the price up to get the job done."

The foregoing facts, all involving conduct by Evans occurring after his statement relied on so heavily by the Government, suggest only deceptive conduct on his part, rather than complicity in a scheme to extort. Moreover, these same facts highlight the individual action of Amabile in resorting to extortion. When Amabile realized that

the subterfuge was no longer working as it had in the past, he decided to take things in his own hands, and, unknown to the others, unmask the fraud and threaten Riley in order to get an approval of the second draw.[3]

The Government also argues that the creation of Carlson Construction merely "put a velvet glove on the iron fist with which Amabile and 'The Man' had terrorized Riley in the past." Although past extortion of Riley had been used to obtain contracts, the Government contends that in the present situation, Amabile, with Evans' cooperation, did not have to resort to force to obtain the sewer contract; instead Amabile could wait and exert his pressure to obtain the money obligated by the contract.

In fact, however, this argument reveals the clear import of the evidence in this case—that a fraudulent scheme was practiced on Riley. When Riley flatly refused to approve the second draw even though Evans had tried to persuade him in the other direction by making a bald misrepresentation, Amabile unilaterally, and perhaps spontaneously, reverted to his more accustomed role, that of an extortionist. This unilateral action on the part of Amabile cannot be transformed into a prior agreement with

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[3] This use of the phrase "the man," like some of its other uses, (*See infra* notes 5-7 and accompanying text) fails to identify the person being referred to. The majority recognizes that in this instance the phrase could refer to either Battaglia or Riley. Yet they conclude by implication that Evans was referring to Riley, stating, "The jury could properly infer that Evans knew Amabile would induce Riley—through fear—to authorize the second draw." If he was instead referring to Battaglia, the most damaging aspect of the Government's case against Evans is neutralized. Because the phrase "the man" is so indefinite and ambiguous, only speculation and surmise could supply the purport of a reference to Battaglia. But the same speculation and surmise is necessary to support the majority's rationale that the statement reflected Evans' awareness that Amabile was going to exercise extortion on Riley.

Evans and Battaglia to extort as the Government charged in the indictment.[4]

The slender reed on which the Government depends to demonstrate an agreement to exort between Amabile and Evans is not even present with respect to Battaglia. The evidence touching upon Battaglia's connection with the crime charged may be summarized as follows. Riley testified that although he had never met Battaglia, he had seen him once in early 1964 in Amabile's night club. DiVito testified that he saw Battaglia talk to Amabile in October of that year in Amabile's club. LaKey testified that in late November or early December, he was with Amabile at Battaglia's farm in Pingree Grove, Illinois, where he was introduced as "Hank LaKey running the

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[4] The record indicates that prior to the second draw Evans told LaKey that the only contracts Evans would "let out here [Lansing] are the ones Joe Shine tells me." Evans' deep involvement with Amabile is further indicated by a statement Evans made to LaKey after the second draw when he said: "I can't get out. I am too deep with Joe Shine. I know too much about the other people." The day before this conversation, LaKey had been called back from Florida to a meeting attended by Amabile and Evans. LaKey described what took place:

> I got in a conversation with Joe Shine first as soon as I got in the Club, he hollered and told me, he said, "You're not paying the bills, you're not taking care of the job. You got me in trouble with Riley. Riley's in trouble. You're making Dave Evans lose his job. You're taking my man right out of Riley's. I don't know what is going on. You are causing nothing but trouble."

In sum, although this testimony confirms Evans' association with Amabile, it just as strongly suggests that their association was in furtherance of a scheme to defraud. At the time of the meeting testified to by LaKey, Evans was unaware that Amabile had committed extortion upon Riley to obtain the second draw. The only inference that can properly be drawn from LaKey's testimony, therefore, was that Amabile was attempting to keep the ruse going by conveying the impression to Evans that the scheme to defraud was still in operation.

job for them in Lansing, Illinois." While there, he heard Battaglia ask Amabile why Evans was "getting that kind of money." Amabile replied: "I made a deal with the man. The man got us the job. . . . I promised him $7,500, I'll take care of it." DiVito testified that in February or March 1965, he went with Pranno to Battaglia's farm. Amabile came a few minutes later and the three of them awaited Battaglia's arrival. According to DiVito, Pranno said in Amabile's and Battaglia's presence, "You know about this Riley deal in Lansing where we got Hank LaKey to set up the company and do the work for us and figure $20,000 in for you?" Battaglia nodded. Pranno and Amabile then argued whether Amabile had taken LaKey away from Pranno. Battaglia interceded by saying: "Cut it out, you fellows. Keep it down." DiVito further testified:

> Then Jim Pranno continued to talk and he says, "You know we had to borrow $5,000 to keep this job in Lansing going and now I can't find LaKey, and you know there was $20,000 in this deal for you." Mr. Battaglia nodded, says "Yes." And then Jim Pranno continued and says, "I want to know what Joe Shine is doing to me. I want you to tell Joe Shine to get that $5,000 from LaKey so that we can pay back this loan," and Jim Pranno continued on to say that Hank LaKey was a no good s.o.b. Then Mr. Battaglia says, "Well, I don't think Hank LaKey is such a bad guy, I like him, I like to work with him," that they had other things coming up, and that they could use him again because he was clean. And after a minute or so, a pause of about a minute, then Mr. Battaglia got up out of his chair and said, "Rocky, I'll see what I can do for you."

On this record there is absent any evidence, direct or circumstantial, demonstrating that Battaglia knew that

money was to be extorted from Riley or that threats were to be made to Riley by Amabile. Nor is there any evidence that Riley feared Battaglia or that Battaglia received any of the money extorted from Riley. Finally, there is no evidence that Battaglia agreed with Amabile, Pranno, or Evans to commit the crime charged against them. Yet the Government argues in its brief:

> Just as Evans acted at Amabile's direction, Amabile worked at the direction of the defendant Battaglia. Amabile was the muscle while Battaglia was the brains, setting policy and settling disputes. His veil of secrecy was his supposed anonymity, known to a few as "The Man." When one wanted to see "The Man," one went to "The Farm."
>
> From the foregoing evidence a jury could infer that Battaglia had a real interest in the outcome of the Lansing project, that he was participating financially in Carlson Construction's contract and that all other co-conspirators acted at his direction, directly as with Amabile, or indirectly, as with Evans.
>
> From his own mouth Battaglia admitted knowledge of Evans' role and that Evans was being paid. Battaglia knew of La-Key's role and that Carlson Construction had the contract on the Lansing project. He knew that La-Key was being used as a front, because "he was clean." With Battaglia's knowledge of the foregoing, the jury could conclude that he was a participant in the conspiracy to place Riley in such a position that when Riley learned that Carlson Construction was in fact Amabile and Battaglia, he would authorize payment of the money in the escrow account, not because of the contract, but because he feared Amabile and "The Man."

These inferences which the Government seeks to draw, some of them non sequiturs, can rise no higher than speculation and surmise.

Much of the Government's case against Battaglia rests on identifying him as "The Man." But of the numerous instances of the use of that phrase in the record, many refer not to Battaglia, but rather to LaKey,[5] Evans,[6] and Amabile.[7] Battaglia's financial stake in the alleged conspiracy to extort is demonstrated, according to the Government, by his two nods and saying "Yes" at the mention of "$20,000 in for you." Although Battaglia's responses to the mention of the money indicate that he was not a stranger to the Lansing venture, they are in no way probative of his complicity in a conspiracy to extort. The force of the Government's argument in this regard is largely diminished by the fact that "the Brains" [Battaglia], who was supposedly "setting policy," had to be reminded twice by Pranno that he had money coming to him.

Reliance is placed by the majority on two Second Circuit cases, *United States* v. *Andolschek,* 142 F.2d 503 (2d Cir. 1944), and *United States* v. *Falcone,* 109 F.2d 579 (2d Cir.), *aff'd,* 311 U.S. 205 (1940). *Andolschek* is cited in support of the proposition that "Battaglia had 'embarked on a criminal venture of indefinite outline' " and therefore, "had to 'take his chances' as to the methods used by the other co-conspirators." The full text of the passage, however, is more illuminating:

> It is true that a party to a conspiracy need not know the identity, or even the number, of his confederates;

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[5] When Amabile went to see Riley concerning the second draw, Amabile said, "*The ma[illegible]'s* got his money coming, Bill, I want you to pay his money." (Emphasis added.)

[6] When LaKey and Amabile were going to visit Evans in the hospital, LaKey said, "Joe, the deal was for $7,500 for *the man.*" (Emphasis added.)

[7] When Riley first met Amabile and Palermo in April 1962, Riley testified, "Mr Shine who I had just met struck his face in my face and told me he was *the man* in Northlake." (Emphasis added.)

> when he embarks upon a criminal venture of indefinite outline, he takes his chances as to its content and membership, so be it that they fall within the common purposes as he understands them. *Nevertheless, he must be aware of those purposes, must accept them and their implications, if he is to be charged with what others may do in execution of them. United States* v. *Andolschek, supra* at 507. (Emphasis added.)

And despite the majority's assertion that the "stringent test of conspiracy liability" set forth in *Falcone* was met by the Government here, that case condemned guilt by mere association.

> There are indeed instances of criminal liability of the same kind, where the law imposes punishment merely because the accused did not forbear to do that from which the wrong was likely to follow; but in prosecutions for conspiracy or abetting, his attitude towards the forbidden undertaking must be more positive. It is not enough that he does not forego a normally lawful activity, of the fruits of which he knows that others will make an unlawful use; he must in some sense promote their venture himself, make it his own, have a stake in its outcome. The distinction is especially important today when so many prosecutors seek to sweep within the drag-net of conspiracy all those who have been associated in any degree whatever with the main offenders. *United States* v. *Falcone, supra* at 581.

There can be no doubt that Amabile and Battaglia associated together, but, as the court stated in *Falcone,* mere association is insufficient evidence of guilt to support a conviction.

II.

Trail Errors

In urging reversal, Battaglia and Evans point to a number of trial errors which they claim not only unduly prejudiced them, but also prevented them from receiving a fair trial. Contrary to the majority's disposition of these contentions, I believe that such errors did occur.

Because of my views on the sufficiency of the evidence, however, I do not believe that an extended discussion of the trial errors is either necessary or appropriate. I only refer to them as they reflect upon the conduct of this trial as a whole, the most striking aspect of which was the unfavorable climate in which the proceedings were conducted. Perhaps no single error occurring outside that climate would be sufficient to require a reversal; however, their cumulative effect, as exemplified by the three errors that will be discussed in detail, leads inevitably to the conclusion that the defendants were denied a fair trial.

A. *Pre-conspiracy Threats*

The indictment charged that a conspiracy among the defendants to violate the Hobbs Act began "in or about July, 1964." Yet, William Riley, the victim of the alleged extortion, was permitted to testify over objection about threats made to him in 1962 and 1963 by defendant Amabile and Nick Palermo. These threats related to Riley's proposed building project in Northlake, Illinois and the subsequent payment of $30,000 to Amabile. Riley also testified about threats made by Amabile and Palermo in 1963 in regard to plumbing work at a Riley building project in Westmont, Illinois. Palermo on that occasion said he "would bury Hubley," Riley's construction superintendent, and Amabile said he "would hammer the nails on the coffin." Amabile made other threats to Riley at that time. Purportedly, this testimony was admitted for the purpose of showing the basis of Riley's fear of

Amabile in January, 1965. There was ample testimony by Riley, however, of threats made by Amabile after the commencement date of the alleged conspiracy.

According to the majority, the testimony of these threats was "relevant to show the reasonableness of Riley's fear when confronted with Amabile's demand to authorize the second draw. The District Court carefully instructed the jury that this testimony was limited to that purpose." Although I agree that proof of the reasonableness of an extortion victim's fear by testimony of prior threats is generally permissible, the testimony of threats made by Palermo, who was not even charged as an unindicted coconspirator, was irrelevant for any purpose. Moreover, I am at a loss to find the "careful instruction" referred to by the majority. Because the testimony of threats by Palermo was both irrelevant and inflammatory, the defendants were prejudiced by the district court's failure to instruct the jury to disregard that testimony. *Cf. United States* v. *Critchley,* 353 F.2d 358 (3rd Cir. 1965).

B. *The Accomplice Instruction*

The accomplice instruction was improper because the district judge, in his definition of an accomplice, for all practical purposes told the jury that the crime charged had in fact been committed. In so doing, he invaded the province of the jury. This kind of an instruction would be proper in a prosecution where the alleged accomplice admitted his participation in a conceded criminal offense. In that situation, an instruction like the one given here correctly delineates the weight to be accorded the testimony of the accomplice as that testimony tends to implicate others in the crime that has been committed. In the instant case, however, the crucial question was not who the participants of a conceded crime were, but whether a conspiracy to violate the Hobbs Act, the crime charged, had been formed by the alleged conspirators.

Because the instruction did not explicitly leave open the question whether any of the witnesses were accomplices, the jury may reasonably have interpreted the instruction as a direction from the judge that the crime charged had been proved. To avoid this substantial risk of prejudice, the instruction should have been framed so that the jurors were unequivocally informed that they were the sole judges of whether any witness was in fact an accomplice. Such modification would have cured the instruction's vice—the implied assumption that the alleged conspiracy was a proven fact. *See Gordon* v. *United States,* 353 F.2d 9 (5th Cir. 1965).

C. *Evans' Character Witnesses*

Evans sought to elicit testimony of his good character through four witnesses. Conceding the somewhat inept manner in which this undertaking was attempted by Evans' counsel, the district judge's treatment of these efforts was nevertheless unduly restrictive. Throughout the course of defense counsel's efforts to question the character witnesses, Government counsel interposed objections to all questions directed to an assessment of Evans' general reputation as an honest, truthful, and law-abiding citizen. On almost every occasion, these objections were indiscriminately advanced by the simple statement, "I object." With equal regularity, the judge sustained the objections, only rarely intimating the reasons for this action.

At one point, Evans' counsel, obviously frustrated and bewildered, asked the judge to elaborate on his prior statement that "the question is improperly put." In response, the judge should have either demanded that Government counsel frame his objections in more concrete and specific terms or sustained the objections in a manner to convey to defense counsel the reason for his rulings. His failure to do so worked an unnecessary

and prejudicial hardship on Evans' counsel's efforts to elicit character testimony from his witnesses.

In addition, some of the court's rulings sustaining the Government's objections were erroneous. On more than one occasion, a foundation was laid to qualify the witness, and the question posed to the witness was properly phrased. The apparent basis for the rulings sustaining the Government's objections to these particular questions was that the testimony sought related to Evans' reputation in the business community rather than his reputation in the community where he lived. The majority relied on this distinction, stating, "[N]o foundation was laid to show that these witnesses knew any of the people who lived in the community where Evans resided."

Reputation in the business community, however, is no less probative than reputation in the residential community to show the absence or presence of certain character traits in an accused. In this regard, Professor McCormick's observation is apposite:

> The reputation is usually said to be limited to that which obtained in the community where the accused lived, but this should be extended to embrace any considerable group with whom he constantly associated in his business, work, or other continued activity, and who might reasonably be thought to have a collective opinion about him. C. McCormick, Handbook of the Law of Evidence § 158, at 335 (1954).

See also Whiting v. *United States,* 296 F.2d 512, 517 (1st Cir. 1961). Because the crime charged against Evans had a business setting, the most probative character evidence was kept from the jury by the court's rulings. These rulings were erroneous. They were also prejudicial. For as the Supreme Court said in *Michelson* v. *United States,* 335 U.S. 469, 476 (1948), "This privilege [of

presenting character testimony] is sometimes valuable to a defendant for . . . such testimony alone, . . . may be enough to raise a reasonable doubt of guilt. . . ."

III.

Instead of the traditional presumption of innocence with which criminal defendants are ordinarily clothed, the record in this case suggests that a presumption of criminality attached to the acts of these defendants because of their infamous reputations and notoriety. The defendants may have been guilty of nefarious conduct for which they deserve imprisonment, or they may have had such bad reputations as to be considered menaces to society. Such facts alone, however, cannot warrant a blinding of eyes, permitting a conviction to stand that is based on surmise rather than evidence. This kind of difficulty is present in this case because the charge on which the defendants were convicted and imprisoned, an agreement to extort money, was not sustained by the evidence. No person should be punished under our criminal laws unless he has been proved guilty of a specific offense by competent evidence in a fair trial. Due process of law demands nothing less.

A true Copy:
Teste:

.....
Clerk of the United States Court of Appeals for the Seventh Circuit.

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1967 JANUARY SESSION, 1968

Nos. 16312 and 16313

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

SALVATORE BATTAGLIA and DAVE EVANS,
Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

APRIL 10, 1968

ON MOTION TO REMAND

Before SCHNACKENBERG, SWYGERT and CUMMINGS, *Circuit Judges.*

CUMMINGS, *Circuit Judge.* Since our opinion was announced, defendants have filed a motion to remand to the District Court to determine the effect of any eavesdropping on this trial in accordance with the procedure prescribed in *Kolod* v. *United States,* 36 U.S. Law Week 3306. In response, the Government has transmitted the transcripts of certain overheard conversations involving defendant Battaglia. This Court had not previously been advised that any electronic monitoring had occurred. A careful *in camera* examination of the transmitted material reveals that these conversations were utterly irrelevant to these convictions. We are frequently called upon to determine relevancy as a matter of law. This case is still pending here on a petition for rehearing *en banc* and the documents are also before us. These factors, coupled

with the utter irrelevancy of the documents make it appropriate to dispose of the matter here. Review here also avoids additional delays to defendants. In our view, *Kolod* does not require further District Court action in the circumstances of this case. If there were any doubt as to the tainting of these convictions by the use of these documents, we would afford relief to defendants. There being no such doubt, there is no need to vacate our judgment and remand for a District Court documentary review. Defendants' motion is denied.

Nos. 16312 and 16313.

SWYGERT, *Circuit Judge*, dissenting.

In view of the Supreme Court's per curiam opinion in *Kolod* v. *United States*, 36 U.S.L.W. 3306 (January 30, 1968), I believe that we are required to remand this case to the district court to determine the effect of any eavesdropping. In *Kolod* the Supreme Court said:

> Accordingly we . . . remand the case to the District Court for a hearing, findings, and conclusions on the nature and relevance to these convictions of any conversations that may be shown to have been overheard through unlawful electronic surveillance. . . . If the District Court decides, on the basis of such findings, that the conviction of the petitioners was not tainted . . . it will enter new final judgments of convictions based on the existing record as supplemented by its further findings, thereby preserving to all affected parties the right to seek further appropriate appellate review. 36 U.S.L.W. at 3307.

In the Government's pending motion to modify the order of the Court, the Solicitor General seeks the following modification:

> We submit, however, that there are sound practical reasons why it would be better practice to require the government to submit the logs preliminarily for an *in camera* inspection by the district judge. This would not of course preclude the district judge from conducting further proceedings in instances where he found that a legitimate purpose might be served thereby.

Both of these extracts recognize that it is the function of the district court, not the court of appeals, to conduct an inquiry into the effect of electronic eavesdropping on a defendant's conviction. As *Kolod* now reads, this court's decision in the instant case is in direct conflict with the procedure outlined in that opinion. And even if the Government's motion to modify is granted, a remand to the district court would remain the only proper disposition.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

September Term, 1967 January Session, 1968

No. 16314

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

JOSEPH AMABILE, *Defendant-Appellant.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

April 26, 1968

Before SCHNACKENBERG, SWYGERT and CUMMINGS, *Circuit Judges.*

CUMMINGS, *Circuit Judge.* This appeal is to review Joseph Amabile's conviction for conspiring with Salvatore Battaglia, Dave Evans and non-defendant Rocco Pranno to violate the Hobbs Act (18 U.S.C. § 1951). The gravamen of the charge was that in January 1965, the conspirators obtained $48,500 from the Riley Management Corporation through threats of bodily harm to its president and economic harm to both. Battaglia's and Evans' convictions were affirmed in .... F.2d .... (7th Cir. 1968).

Amabile first argues that the Government failed to prove that he conspired to obtain money from Riley Management Corporation by extortion. A like argument was advanced by Battaglia and Evans and rejected in their appeals. For the reasons stated in the prior opinion, the evidence was sufficient to support Amabile's conspiracy conviction. See .... F.2d at pp. ..... .

Amabile's next point is that his "extortionate threat made against a man [William Riley, president of the Riley Management Corporation] whose business touches inter-

state commerce" does not violate the Hobbs Act because the threat was only indirectly and remotely connected with interstate commerce. We disposed of this issue in the opinion dealing with Amabile's co-defendants. See .... F.2d at p. ..... However, since Amabile presses the issue to considerable extent, further discussion may be warranted.

The Hobbs Act "speaks in broad language, manifesting a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery or physical violence." *Stirone* v. *United States,* 361 U.S. 212, 215. As to the commerce power, the Supreme Court has recently stated in *Katzenbach* v. *McClung,* 379 U.S. 294, 305:

> "The power of Congress in this [commerce] field is broad and sweeping; where it keeps within its sphere and violates no express constitutional limitation it has been the rule of this Court, going back almost to the founding days of the Republic, not to interfere."

Since Congress has used all its "broad and sweeping" commerce power in enacting the Hobbs Act, the courts have rightly attributed great scope to the statute. Thus in language applicable here, Judge Sanborn stated as follows in *Hulahan* v. *United States,* 214 F.2d 441, 445 (8th Cir. 1954), certiorari denied, 348 U.S. 856:[1]

> "It seems apparent from the language of the statute that it was the intent of Congress to protect interstate commerce against extortion or attempted extortion which in any way or *in any degree* reasonably could be regarded as affecting such commerce. The exaction of tribute from contractors engaged in local

[1] Recent instances where this Court has affirmed Hobbs Act convictions in cases involving construction projects are *United States* v. *Kramer,* 355 F.2d 891, (7th Cir. 1966), certiorari denied (except on an irrelevant point) 384 U.S. 100, and *United States* v. *Sopher,* 362 F.2d 523 (7th Cir. 1966), certiorari denied, 385 U.S. 928.

> construction work who are dependent upon interstate commerce for materials, equipment and supplies, or who are engaged in constructing facilities to serve such commerce, is, in our opinion, proscribed by [the Hobbs Act]." (Emphasis supplied)[2]

As in *Hulahan,* Amabile was exacting tribute from a builder "dependent upon interstate commerce for materials, equipment and supplies" and was therefore within the reach of the Hobbs Act. It is unnecessary that the extortion have as substantial an effect on interstate commerce as a combination in restraint of trade. *United States* v. *Malinsky,* 19 F.R.D. 426, 428 (S.D. N.Y. 1956).

As pointed out in our prior opinion, the $48,500 payment made pursuant to Amabile's threats depleted Riley Management Corporation's reserves. Depletion is pertinent in considering commerce under the Hobbs Act. Thus in *United States* v. *Provenzano,* 334 F.2d 678, 692 (3d Cir. 1964), certiorari denied, 379 U.S. 947, a Hobbs Act commerce instruction was approved which stated in part:

> "Where the resources of a business are depleted or diminished in any manner or degree by payments of money obtained by extortion the capacity to efficiently conduct such business is to the extent of the drain on its resources likely to be impaired."

The Hobbs Act does not require that the threats to Riley and his family be directly aimed at interstate commerce. In the statute Congress defined extortion as obtaining property through "actual or threatened force, violence, or fear" (18 U.S.C. § 1951(b)(2)). There is no requirement that the extortion be directed at interstate

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[2] The *Hulahan* case has been followed by this Court at least twice: *United States* v. *Floyd,* 228 F.2d 913, 916, 918-919 (7th Cir. 1956), certiorari denied, 351 U.S. 938; *United States* v. *Green,* 246 F.2d 155, 160 (7th Cir. 1957), certiorari denied, 355 U.S. 871.

commerce as long as the extortion "in any way or degree obstructs, delays, or affects commerce" (18 U.S.C. § 1951 (a)). To accept appellant's construction would mean that Congress had exempted the most efficacious of threats. Certainly Congress did not intend such an anomalous result.

Like his co-defendants, Amabile asserts that the District Court undûly restricted cross-examination. He first asserts that he was not permitted to undermine Riley's testimony that the Lansing, Illinois, building project was meant to be kept a secret from Amabile and Palermo. As we pointed out in our earlier opinion, "Evans' counsel was permitted to elicit that the Riley company had prepared a brochure to promote sales of the Lansing apartments, and that the Hammond *Times* published a story about the project in August, 1964." .... F.2d ..... In addition Battaglia's counsel was permitted to cross-examine Riley, without objection, about advertising for the Lansing project, selling units therein before construction, and taking salesmen to Las Vegas to promote this project. It is clear that Amabile was given sufficient latitude to rebut the secrecy of the Lansing project.

Amabile also complains of the District Court's refusal to let his counsel ask Riley about the contents of five statements he had given to the Federal Bureau of Investigation, made available to defense counsel under the Jencks Act (18 U.S.C. § 3500). Riley had already testified that he advised the FBI of the 1962-1963 threats of Palermo and Amabile and that he had not read the statements. He of course had no way of knowing whether his complaints of the physical threats of Amabile and Palermo had been transcribed by the FBI in those statements. Amabile's counsel made no attempt to introduce the statements, so that they are not in the record. If the FBI statements were actually devoid of any reference to the Amabile-Palermo threats, Amabile's counsel should have called the recording FBI agents in order to lay a proper founda-

tion for the admission of the five statements to impeach Riley. As Judge Friendly ruled in *United States* v. *Borelli*, 336 F.2d 376, 391 (2d Cir. 1964), certiorari denied, 379 U.S. 960:

> "when the witness is confronted with what appears to be an inconsistency, he may deny having made the contradictory statement to the agent and counsel's only recourse would be to call the agent and endeavor to have him prove the contrary."

See also 3 Wigmore on Evidence (3d ed.) § 1025.

Amabile repeats another argument offered by his co-defendants in their appeals, namely, that he was not permitted to show that Riley expected consideration in a state court theft indictment and in a federal tax investigation in return for his testimony herein. We rejected this argument in the prior appeal in the last paragraph of our discussion under "Restriction of Cross-examination and Refusal to Admit Defense Exhibits" (.... F.2d at p. ....). The elaboration of this subject in Amabile's briefs calls for a more detailed discussion.

Of course, a defendant may normally show that a prosecution witness expects favorable treatment from the Government in return for his testimony. 3 Wigmore on Evidence (3d ed.) § 967. It is also well settled that the credibility of a witness may not be impeached by showing that he has been arrested and indicted. *Michelson* v. *United States*, 335 U.S. 469, 482; *United States* v. *Bolden*, 355 F.2d 453, 457 (7th Cir. 1965), certiorari denied, 384 U.S. 1012; Wigmore, *op cit.*, § 980a. This principle applies *a fortiori* to a federal tax investigation that has not resulted in charges being brought against the witness. In the present case, the District Judge was faced with a collision of these two principles. He was entitled to balance the conflicting interests and therefore did not abuse his discretion in keeping Riley's theft indictment and federal tax investigation from the jury.

Viewed in isolation, Amabile's effort to explore Riley's motives for testifying in the Government's favor might be proper. But we must heed the counsel proffered in *Johnson* v. *United States*, 318 U.S. 189, 202 (concurring opinion):

> "In reviewing criminal cases, it is particularly important for appellate courts to re-live the whole trial imaginatively and not to extract from episodes in isolation abstract questions of evidence and procedure. To turn a criminal appeal into a quest for error no more promotes the ends of justice than to acquiesce in low standards of criminal prosecution."

Applying this counsel, Amabile's entire cross-examination of Riley has been scrutinized.

Riley was subjected to a lengthy cross-examination, and Amabile's attempts to go into the state court indictment and tax investigation occurred very early. Thereafter, on at least seven occasions, Riley was asked questions implying that he was an unsavory character and financially irresponsible.[3] Counsel for Amabile then again sought

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[3] Seven such occasions are as follows:

"Q. Weren't you arrested while you were drunk for exposing yourself?"

• • • • •

"Q. Did you ever get into a fight with a young man at the El Morrocco Club because you were so drunk?"

• • • • •

"Q. As a matter of fact, isn't it true in order to get that loan you bribed one of the officers [of the savings and loan association]?

"A. No, sir.

"Q. And paid him $25,000.?"

• • • • •

"Q. Did you know it was an offense against the laws of the United States to bribe an official of a loan association for the purpose of obtaining a loan?"

• • • • •

to return to the state court proceedings against Riley. The series of intervening questions was so obviously improper that there has been no attempt on appeal to justify them. Considering the impropriety of the entire inquiry, it is patent that Amabile's references to the state indictment and federal tax investigation were designed to prejudice the jury against Riley through smear and innuendo rather than to impugn his veracity. Cf. *United States* v. *Pennix*, 313 F.2d 524, 528-530 (4th Cir. 1963).

The District Court's rulings are also supportable on the ground that appellant's "questions do not appear sufficiently likely to have developed evidence that would have significantly weakened the Government's case" by showing the witness' bias. *United States* v. *Jones*, 360 F.2d 92, 96 (2d Cir. 1966), certiorari denied, 385 U.S. 1012. The United States Attorney does not control investigations being conducted by the Internal Revenue Service. Such investigations are common and usually involve no threat of an indictment. As to the state court criminal action, the United States Attorney was of course not empowered to accord any consideration. On this record, the District Court could properly conclude that the questions were speculative, unrelated to the charges against the defendant and not of sufficient probative value to show bias. *Dis-*

"Q. Weren't you sued by Margaret Gillespie for fraud?"

* * * * *

"Q. As a matter of fact, you were broke at that time."

* * * * *

"Q. * * * did you sign a check to a payee by the name of Bona for $23,000 which came back 'NSF'?"

trict of Columbia v. *Clawans,* 300 U.S. 617, 632;[4] *Lott* v. *United States,* 230 F.2d 915, 918 (5th Cir. 1956), certiorari denied, 351 U.S. 953; *Leary* v. *United States,* 383 F.2d 851, 868 (5th Cir. 1967); *United States* v. *Higgins,* 362 F.2d 462 (7th Cir. 1966), certiorari denied, 385 U.S. 945; *Abeyta* v. *United States,* 368 F.2d 544 (10th Cir. 1966).[5]

Because the United States Attorney was not empowered to influence the course of the state theft case or the tax investigation, and because the questions, in the light of other improper questions as to Riley during his cross-examination, were part of a smear campaign, we cannot say that the District Court abused its discretion in its rulings concerning these two subjects.

Amabile claims that his counsel was given insufficient time to read a 6-page statement that witness Henry La-

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[4] In *Clawans,* the reversal of the District Court was affirmed, but the Court observed (300 U.S. at p. 632):

> "The extent of cross-examination rests in the sound discretion of the trial judge. Reasonable restriction of undue cross-examination, and the more rigorous exclusion of questions irrelevant to the substantial issues of the case, *and of slight bearing on the bias and credibility of the witnesses,* are not reversible errors." (Emphasis supplied)

[5] Amabile has cited no case holding that it is reversible error to refuse to allow a defendant to show that a prosecution witness is biased because he expects favorable treatment on a pending indictment in another jurisdiction or in a tax investigation. In *United States* v. *Masino,* 275 F.2d 129 (2d Cir. 1960), favorable treatment had actually been accorded to the witness, and in *Gordon* v. *United States,* 344 U.S. 414, the trial judge warned the witness awaiting sentence on a guilty plea that leniency depended upon cooperation with the government. *Wheeler* v. *United States,* 351 F.2d 946 (1st Cir. 1965), and *Harris* v. *United States,* 371 F.2d 365 (9th Cir. 1967), are distinguishable because they involved direct financial benefits to the witness.

Key had given to the FBI.[6] This statement was delivered to defense counsel under the Jencks Act at 10 A.M. on April 21, 1967. He had sufficient opportunity to read it from then until 2 P.M., when the usual noon recess ended and the cross-examination of LaKey began. There has been no showing that his cross-examination of LaKey would otherwise have been different if more time had been allowed for study of LaKey's statement. Co-defendants' counsel did not even raise the point on appeal. In the absence of a showing of prejudice, the District Court did not abuse its discretion by allowing only such time as is "reasonably required for the examination of such statement" (18 U.S.C. § 3500 (c)).

Battaglia contended on his appeal that the Government should have granted his request for production of Mike DiVito's grand jury testimony. We held that production was unnecessary. See —— F.2d ——. In addition to DiVito's grand jury testimony, Amabile insists that he was entitled to the minutes of the grand jury testimony of witnesses Henry LaKey and William Riley.[7] Each request was made during the cross-examination of these witnesses. We find no error was committed by the District Court's failure to turn over these grand jury minutes.

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[6] This statement is part of the record on appeal and took us and Government counsel less than 11 minutes to read. The District Court was able to digest and rule on ten such statements by witness Riley during the April 27th luncheon recess.

[7] Excerpts from Riley's grand jury testimony were appended to Battaglia's petition for rehearing of his appeal. They show that Amabile purportedly made the following threat to Riley in 1964 as to the tax investigation of Riley:

> "Don't tell them anything. You know what happens to guys who talk, don't you?"

Riley replied to Amabile and Palermo: "What is the matter with you guys? On one hand you tell me you will kill me if I don't pay you the money; on the other hand these guys [Internal Revenue agents] tell me they will put me in jail."

Amabile relies principally on *Dennis* v. *United States*, 384 U.S. 855, but that case adheres to the earlier standard that a trial court need not allow the defense to examine grand jury minutes in the absence of a showing of a particularized need. At the time that Amabile's counsel requested the grand jury testimony of each of these witnesses, unlike counsel for the defendants in *Dennis*, he did not show particularized need and cannot now supply that requirement by hindsight.

Here, as in *United States* v. *Procter & Gamble Co.*, 356 U.S. 677, and *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395, defendants sought a wholesale disclosure of grand jury testimony as a matter of right, whereas in *Dennis* the defendants only sought a disclosure of particular testimony.

Moreover, in *Dennis*, there was a 7-year time lag between the grand jury and trial testimony. Thus as Judge Waterman pointed out in *United States* v. *Youngblood*, 379 F.2d 365, 367 (2d Cir. 1967), "there was reason to assay the latter [trial] testimony, some of which is 15 years after the event against the much fresher testimony before the grand jury" concerning occurrences between 1948 and 1955. Here there was no such significant interval between the 1966 grand jury testimony of these witnesses and their 1967 trial testimony.

When Amabile's counsel asked to inspect the grand jury testimony, the Assistant United States Attorney offered to give a copy to the Court for an *in camera* inspection.[8] This offer was not accepted by defense counsel. If it had been accepted, the statements might have been turned over to them, so that any error in this connection was of defendant's own making.

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[8] The Supreme Court has not disapproved of *in camera* inspection by a trial court in order to enable it to rule on a defense motion for production of grand jury testimony. *Dennis* v. *United States*, 384 U.S. 855, 874.

For all these reasons, there was no abuse of discretion in denying production of the grand jury transcripts.

In *United States* v. *Youngblood*, 379 F.2d 365, 370 (2d Cir. 1967), the Court of Appeals for the Second Circuit promulgated a prospective rule giving the defense access as of right to a witness' grand jury testimony on the subjects about which he testified at the trial, unless the Government can show that access should be denied. At the oral argument of this appeal, the Government stated that it had no objection to such a prospective rule in this Circuit. We approve of the *Youngblood* procedure and adopt it with respect to trials commencing after this judgment is entered.

Amabile's final point is that the District Court erred in failing to order a pre-trial preliminary examination before a commissioner pursuant to Rule 5(c) of the Federal Rules of Criminal Procedure.[9] However, by its terms, Rule 5 was meant to afford an arrested person an opportunity to challenge the existence of "probable cause to believe that an offense has been committed and that the defendant has committd it." As the Supreme Court has stated, a preliminary hearing under Rule 5 is not required where, as here, an indictment has already been returned (*Jaben* v. *United States*, 381 U.S. 214, 220), for the grand jury already has found probable cause for holding the defendant for trial. *Bayless* v. *United States*, 381 F.2d 67, 71 (9th Cir. 1967). *Sciortino* v. *Zampano*, 385 F.2d 132, 133 (2d Cir. 1967), certiorari denied, 390 U.S. 906.[10] Neither the lan-

[9] Rule 5(c) provides in pertinent part:

"* * * If the defendant does not waive examination, the commissioner shall hear the evidence within a reasonable time. The defendant may cross-examine witnesses against him and may introduce evidence in his own behalf. * * *"

[10] In *Sciortino*, Judge Hays showed that the contrary rule in *Ross* v. *Siriça*, 380 F.2d 557 (D.C. Cir. 1967), was not supported by a majority of that Court, nor has it been adopted in any other Circuit. See 385 F.2d at p. 134.

guage of Rule 5 nor its history supports Amabile's assertion that its purpose was to afford pre-trial discovery.

The judgment of the District Court is affirmed.

No. 16314.

SWYGERT, *Circuit Judge*, dissenting.

I am constrained to dissent on several grounds. First, I adhere to the views expressed in my dissent in *United States* v. *Battaglia, et al.*, No. 16312 and No. 16313 (7th Cir. Jan. 9, 1968) that there was insufficient evidence of a conspiracy engaged in by Amabile with Battaglia and Evans "to obstruct, delay and affect commerce" in the movement of materials for the construction of the Riley dwelling units in Lansing, Illinois by means of extortion.

Second, regardless of the question of the sufficiency of the evidence to show a conspiracy to extort money, there was no proof of a violation of the Hobbs Act, 18 U.S.C. § 1951. Although this issue was presented obliquely in the Battaglia appeal, Amabile has advanced arguments which bring the question into sharper focus.

The evidence showed that during the construction of the Lansing project, Riley obtained building materials from suppliers located outside the State of Illinois. There was no evidence, however, that there was any delay in the shipment or delivery of these materials. Moreover, there was no evidence that any extortion threat directed against Riley carried with it, express or implied, a threat that the work on the Lansing project would be stopped or hindered.

In *United States* v. *Pranno*, 385 F.2d 387, 389 (7th Cir. 1967), *cert. denied*, 36 U.S.L.W. 3346 (Mar. 5, 1968), we said:

> The Supreme Court has made it clear that the statute is to be construed broadly and is not limited to conduct which directly and immediately obstructs a particular movement of goods in interstate commerce. Extortion by threat to disrupt a local activity the stoppage of which would in turn result in stoppage of interstate shipment of raw materials essential for that activity falls within the act. The statute seems to be read as not only prohibiting the obstruction of commerce by extortion, but also prohibiting extortion by any threat, *the carrying out of which would obstruct commerce.* (Emphasis added.)

I interpret this statement to mean that a threat to extort proscribed by the Hobbs Act must have a reasonable causal relation to interstate commerce. The likelihood of an obstruction to the flow of commerce must be the result of the threat. This essential nexus is missing in the instant case.

The majority, quoting from *Hulahan* v. *United States*, 214 F.2d 441 (8th Cir.), *cert. denied*, 348 U.S. 856 (1954), says that "Amabile was exacting tribute from a builder 'dependent upon interstate commerce for materials, equipment and supplies' and was therefore within the reach of the Hobbs Act." The facts in that case, however, were entirely different from those presented here. There the defendant, a labor union representative, conspired to extort money from local construction companies by threats of labor unrest. These companies were dependent for the continuation of work undertaken by them upon local labor represented by the defendant and upon supplies and materials shipped interstate. Thus the extortion threats, if not complied with, would in all probability have brought a cessation of work on the project, thereby interrupting the interstate shipments of construction materials. In the instant case, however, there was no such probability that Amabile's threats to Riley, if not complied with, would have resulted in the interruption of the shipment of con-

struction supplies and materials for the Lansing project. (In fact, it was to Amabile's advantage that the Lansing project proceed without interruption; for only then would Riley have authorized Carlson Construction Company to request "draws" for funds upon the Lawn Savings & Loan Association).

The majority also makes reference to the fact that the "$48,500 payment made pursuant to Amabile's threats depleted Riley Management Corporation's reserves." If a depletion of reserves is all that is necessary to show the requisite effect on commerce, then a threat of any kind to extract money made to a person who happens to operate a business engaged to any extent in interstate commerce comes within the statute's proscription. Under this rationale, a retail store owner, for example, would be afforded federal protection from extortion, regardless of the nature or the likely effect of the threat, simply because his stock of merchandise had in some measure moved in interstate commerce. I do not believe that the Hobbs Act was intended to have such a broad reach. In that connection, Judge Hastie's statement in his dissent in *United States* v. *Stirone*, 262 F.2d 571, 578, 579 (3d Cir. 1958), *rev'd on other grounds*, 361 U.S. 212 (1960), is pertinent:

> [I]t should be considered and kept in mind that the control and punishment of local extortion is primarily the business of local or state government. The Hobbs Act is an auxiliary and partially duplicating federal superimposition on state law enforcement. In the view of Congress this is a desirable measure of federal assistance to the states in the exercise of their police power. But where state power and responsibility are thus primary and the national government is merely performing an auxiliary function, we should not be eager to stretch federal jurisdiction to cover doubtful

cases offering a tenuous or speculative theory of federal jurisdiction.[1]

Third, an error which alone would require reversal (presented rather cursorily in the Battaglia and Evans appeals) relates to the district judge's restriction of Amabile's cross-examination of William J. Riley. Counsel for Amabile attempted to bring before the jury the facts that Riley was under indictment for theft in the state court, that he was under investigation by the Internal Revenue Service for tax evasion, and that his testimony was given in the hope of securing favorable treatment from local and federal law enforcement officers concerning his allegedly illegal conduct. The district judge refused to permit cross-examination on these subjects.[2]

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[1] The majority quotes from *Katzenbach* v. *McClung*, 379 U.S. 294 (1964), to support the proposition that, "Since Congress has used all its 'broad and sweeping' commerce power in enacting the Hobbs Act, the courts have rightly attributed great scope to the statute." I respectfully submit that the abstract language quoted from *McClung* has no application to the instant case. A decision upholding the constitutionality of the Civil Rights Act of 1964 under the commerce power can hardly have pertinency to the intended scope of the Hobbs Act.

[2] The relevant portion of the transcript reads:

[Mr. Bellows, Amabile's counsel:]

Are you the same William G. Riley who was indicted by the Criminal Court of Cook County for thievery in 1966 in the month of February.

Mr. Lamendella: [Assistant United States Attorney] I will object to that, your Honor.

The Court: I will sustain the objection. Mr. Bellows, you know better than that.

Mr. Bellows: I will connect it up, your Honor.

The Court: Mr. Bellows, you know better than that and I direct the jury to disregard that question.

By Mr. Bellows:

Q. Are you under indictment in the Criminal Court Cook County?

Mr. Lamendella: I will object to that.

The Court: I sustain the objection and I direct counsel, Mr. Bellows, to refrain from asking that kind of question. I direct the jury to disregard that question.

Mr. Bellows: May I have a side-bar conference, your Honor, with reference to this?

The Court: No, no side-bar conference after those questions, sir.

Mr. Bellows: May I be permitted to make an offer of proof outside the presence of the jury?

The Court: In respect to that last question, you may.

* * *

Mr. Bellows: Your Honor, my offer of proof is as follows: I expect to show by cross examination and it may be verified, if you choose to do so, if he denies the fact, that he was indicted in the month of February, 1966, for the crime of theft which is a felony; that the matter has been pending now over a year and that the reason for the extraordinary delay in bringing this matter to justice for a crime of theft—actually it was forgery, but under our new statute, your Honor, it is considered to be theft—is that he expects to get consideration, your Honor, from the court and the prosecution in Cook County for his cooperation with the government in this case and for his testimony in this case.

For that reason, your Honor, I think it is extremely important to show motive and reason for his testimony in this case.

The Court: What is the government's position in respect to the offer of proof of the defendant Amabile?

Mr. Lamendella: May we have just a moment?

The Court: Yes.

Mr. Lamendella: If this offer is being made, your Honor, to impeach the witness on the basis of an indictment, we object.

The Court: Do you object to the offer?

Mr. Lamendella: Yes, we do.

The Court: I sustain the objection.

Bring in the jury.

Mr. Bellows: May I add one more point, your Honor?

The Court: I have ruled on your offer. You can't add to an offer once it is made, sir.

Mr. Bellows: I want to explain the position of Lamendella to be inconsistent with my offer. He says he objects to the indictment. This is beyond the indictment.

The majority concedes that when "viewed in isolation" defense counsel's "effort to explore Riley's motives for testifying in the Government's favor might be proper." The majority goes on to say, however, that a defendant's right to show that a prosecution witness expects favorable treatment from the Government in return for his testimony must be balanced against the rule that the credibility of a witness may not be impeached by showing that he has been

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The Court: He said he objected to the offer.

Mr. Bellows: Well, he said to the indictment.

The Court: You object to the offer of proof?

Mr. Lamendella: I do, your Honor.

• • •

The Court: You may continue, Mr. Bellows, with the cross examination of this witness.

By Mr. Bellows:

Q. Mr. Riley, are you presently under investigation by the Internal Revenue for evasion of taxes?

Mr. Lamendella: I will object to that, Your Honor.

The Court: I sustain the objection.

Mr. Bellows: May I make another offer of proof?

The Court: Yes.

• • •

Mr. Bellows: My offer of proof, your Honor, is that Mr. Riley, the witness on the stand, is presently under investigation by the Internal Revenue; that he has two lawyers prominent in the tax field in criminal cases representing him, and that if he were cross examined, your Honor, he would admit, I am sure, that he knows that his financial affairs are under investigation by the Internal Revenue for failure to account for taxes and for the evasion of taxes, and that his books are in the hands of the Internal Revenue agents, and that he expects to get consideration, your Honor, from the government for his cooperation with them in this case and for his testimony in this case.

The Court: What is the position of the government in respect to the offer of proof of the defendant Amabile?

Mr. Lamendella: We object, your Honor.

The Court: I sustain the objection.

• • •

indicted or is under investigation, and that the balancing of these conflicting rules entitled the district judge to use his discretion in deciding whether to permit cross-examination on Riley's expectation of favorable treatment.

I do not believe that a conflict between these evidentiary rules, such as the one the majority attempts to erect, exists. The right of a defendant in a criminal prosecution to cross-examine witnesses testifying against him is guaranteed by the sixth amendment to the Constitution. Courts have not been grudging in their protection of this right. As the Supreme Court recently stated in *Pointer* v. *Texas*, 380 U.S. 400, 405 (1965):

> There are few subjects, perhaps, upon which the Court and other courts have been more nearly unanimous than in their expressions of belief that the right of . . . cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal.

Both the treatises and the case law recognize the propriety of the kind of cross-examination in which Amabile's counsel sought to engage. Thus Professor McCormick says:

> The law recognizes the slanting effect upon human testimony of the . . . self-interest of the witness in the outcome of the case. Any such partiality, proceeding from any acts, relationships or motives, may be proven to impeach credibility . . . . [One such instance is] in a criminal case when the witness testifies for the state and it is shown that an indictment is pending against him, . . .
>
> C. McCormick, Handbook of the Law of Evidence § 40, at 82, 83, 84 (1954).

See *Harris* v. *United States*, 371 F.2d 365 (9th Cir. 1967); *Wheeler* v. *United States*, 351 F.2d 946 (1st Cir. 1965);

United States v. *Masino*, 275 F.2d 129 (2d Cir. 1960). As the Second Circuit observed in *Masino:*

> Cross-examination is proper when its purpose is to reveal bias or interest on the part of the witness being examined . . . . It was highly relevant and material to bring out that the state court charge . . . had been quashed upon the intercession of the Assistant United States Attorney as was claimed by the defense and not denied by the government.[3] This is the kind of situation where the widest possible cross-examination should be permitted. The appellant was entitled to have the jury know what had happened with respect to the charge, including any part which representatives of the government had played, so that the jury could draw its own conclusions with respect to possible motives for Brown's testimony. 275 F.2d at 132.

It is apparent from the record that the district judge perceived no "collision" of the kind suggested by the majority. Moreover, any attempt to show the bias of a witness by evidence that he is under indictment or investigation would create the same "collision." Thus the rule enunciated by the majority might preclude cross-examination of this kind in every case, a result contrary to the general rule permitting such inquiry. I believe that Amabile's efforts to question the credibility of Riley by showing his relationship to the Government and the reward he hoped to gain by reason of his testimony was entirely proper and should have been permitted.

Finally, the prejudicial trial errors discussed in my dissent in *Battaglia,* other than the exclusion of the testimony

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[3] The majority says, "As to the state court criminal action, the United States Attorney was of course not empowered to accord any consideration." This observation ignores the possibility that the United States Attorney might have interceded with the local authorities on behalf of Riley, a situation similar to that occurring in *Masino.*

of character witnesses on behalf of Evans, have equal applicability to the instant case. These errors additionally and cumulatively require a reversal.

A true Copy:
Teste:

.....
Clerk of the United States Court of Appeals for the Seventh Circuit.

Judgment

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

Tuesday, January 9, 1968

Before: Hon. ELMER J. SCHNACKENBERG, *Circuit Judge*
Hon. LUTHER M. SWYGERT, *Circuit Judge*
Hon. WALTER J. CUMMINGS, *Circuit Judge*

No. 16312, 16313

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

SALVATORE BATTAGLIA and DAVE EVANS,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgments of the said District Court in this cause appealed from be, and the same are hereby,

AFFIRMED, in accordance with the opinion of this Court filed this day.

Order

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

Wednesday, April 17, 1968

Before: Hon. ELMER J. SCHNACKENBERG, *Circuit Judge*
Hon. LUTHER M. SWYGERT, *Circuit Judge*
Hon. WALTER J. CUMMINGS, *Circuit Judge*

No. 16312

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

SALVATORE BATTAGLIA, *Defendant-Appellant.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

IT IS ORDERED by the Court that the petition for a rehearing of this cause be, and the same is hereby, DENIED.

Grand Jury Testimony

WILLIAM J. RILEY, called as a witness by the Grand Jury, having been first duly sworn by the Foreman, was examined and testified as follows:

Examination by Mr. Bailey.

Q. Would you state your name, please sir?

A. William J. Riley.

Q. Would you tell us your address Mr. Riley?

A. 1522 Stonegate Road, La Grange Park, Illinois.

Q. Now, Mr. Riley, before we go any further at this point I want to advise you that you have certain rights as a witness appearing here under subpoena before the Grand Jury.

Now, one of these rights is the right to refuse to answer any question which may be asked of you which might in any way tend to incriminate you and that's your right under the Fifth Amendment to the Constitution of the United States.

Are you aware of that, sir?

A. Yes sir.

Q. And you also have the right, of course, if you desire, to consult with Counsel of your choosing prior to your appearance here and I presume you have so consulted with your Counsel, have you not, sir.

A. Yes, sir.

Q. And who is your attorney, sir?

A. Mr. Crowley.

Q. Now, Mr. Riley, would you tell the ladies and gentlemen of the Grand Jury your occupation, please?

A. I am a real estate broker.

Q. And under what business name do you do business?

A. The Riley Management Corporation.

Q. And is that a corporation incorporated under the laws of the State of Illinois?

A. Yes.

Q. Now, were you so employed in that business in 1962, sir?

A. Yes, I was.

Q. All right. Is it part of the business of the Riley Management Corporation to develop and manage an apartment development in North Lake, Illinois, known as the King Authur Apartments?

A. I respectfully decline to answer on the grounds that my answer might tend to incriminate or dishonor me.

Mr. Betar: Or what?

A. Or degrade me.

Mr. Betar: You think you would be degraded by giving us an answer to that question, Mr. Riley?

A. Is that a question?

I respectfully decline to answer on the grounds that answer might tend to incriminate me or degrade me.

Mr. Bailey: Q. When did you begin construction of the King Arthur Apartments in North Lake, sir?

A. I respectfully decline to answer on the grounds that my answer may tend to incriminate or degrade me.

Mr. Betar: You know Rocco Pranno?

A. I respectfully decline to answer that question on the grounds the answer may tend to intimidate me or—incriminate me or degrade me.

Mr. Betar: It might degrade you but I don't think it—do you know Jimmy Martell?

A. I respectfully decline to answer.

Mr. Betar: On what grounds?

A. On the ground that my answer may tend to incriminate or degrade me.

Mr. Bailey: Q. Do you know Joseph Amalbiae?

A. I respectfully decline to answer on the grounds that my answer may tend to incriminate or degrade me.

Q. Do you know him by any other name? Do you know the name Joe Shine?

A. I respectfully decline to answer on the grounds my answer may tend to incriminate or degrade me.

Q. Have you ever been in the El Morocco Lounge?

A. I respectfully decline to answer on the grounds my answer may tend to intimidate or degrade me.

Mr. Betar: Did you—

Mr. Bailey: You said "intimidate" I think you mean "incriminate"?

A. Yes.

Mr. Betar: Did you talk with Mr. Bailey and myself and Mr. Walsh and Mr. Komensky at your home last week, one evening?

A. I wonder if I might talk to my counsel?

Mr. Bailey: If you would like an opportunity to consult with Counsel about that question, you may.

(Witness left the room.)

The Witness: A. Yes, I did.

Mr. Betar: I take it you consulted with your counsel prior to answering that question, is that correct, Mr. Riley?

A. That is correct.

Mr. Bailey: Q. What are your duties? Would you mind telling the Grand Jury what the job of a real estate broker is?

You told us you were a real estate broker. What duties does that entail? What does a real estate broker do?

A. You are talking about a real estate broker in general?

Q. You, you as a real estate broker, what do you do as a real estate broker?

A. You are asking me to commit myself respectfully—not the real estate brokers in general?

I respectfully decline to answer on the grounds that my answer may tend to incriminate or degrade me.

Examination by Mr. Betar.

Q. What do real estate brokers generally do?

A. Generally, real estate brokers sell real estate, rent real estate, lease real estate for other people.

Q. Are you an officer of the Riley Management Corporation?

A. I respectfully decline to answer on the grounds my answer may tend to incriminate or degrade me.

Q. Is your wife an officer of the Riley Management Corporation?

A. I respectfully decline to answer on the grounds that my answer might tend to incriminate or degrade me.

Q. Your wife? You are answering that question about your wife, that it would tend to incriminate you or degrade you?

A. I respectfully decline to answer on the grounds my answer may tend to incriminate or degrade me.

Q. Did you ever pay any money to Joe Shine?

A. I respectfully decline to answer on the grounds that my answer might tend to incriminate or degrade me.

Q. Ever pay any money to Joe Amalbiae?

A. I respectfully decline to answer on the grounds my answer may tend to incriminate or degrade me.

Q. Did you ever pay any money to Rocco Pranno?

A. I respectfully decline to answer on the grounds that my answer might tend to incriminate me or degrade me.

Q. Did the Riley Management Corporation ever pay any money to those three persons?

A. I respectfully decline to answer on the grounds my answer might tend to incriminate or degrade me.

Mr. Bailey: Are you acquainted with Leo Shibaiba (phonetic)?

A. I respectfully decline to answer on the grounds that my answer may tend to incriminate or degrade me.

Mr. Betar: Q. He at one time was an alderman in the City of North Lake, was he not?

A. I respectfully decline to answer on the grounds my answer may tend to incriminate or degrade me.

Q. You know Pete Anderson?

A. I respectfully decline to answer on the grounds my answer may tend to incriminate or degrade me.

Mr. Bailey: Pete Anderson is the Building Commissioner of the City of North Lake, isn't he?

A. I respectfully decline to answer on the grounds my answer may tend to incriminate or degrade me.

Mr. Betar: Q. Do you have a lawyer in the Riley Management Corporation, legal counsel, I mean other than your counsel who represents you here today, an internal lawyer?

A. I respectfully decline to answer on the grounds that my answer may tend to incriminate or degrade me.

Mr. Bailey: Did you ever pay any money to Leo Shibaiba or Pete Anderson?

Mr. Betar: Q. How do you think you will be degraded, Mr. Riley? I am just interested. I can see how you can be incriminated but I don't see how you—

A. I respectfully decline to answer on the grounds my answer may tend to incriminate or degrade me.

Q. I am disappointed in you, Mr. Riley, I thought you were more of a man then you have demonstrated here before the Grand Jury after I talked with you, but we all make mistakes.

Examination by Mr. Bailey.

Q. Did you file personal income tax returns on Form 1040 for the year of 1962, Mr. Riley?

A. I respectfully decline to answer on the grounds that my answer may tend to incriminate or degrade me.

Q. You file them for the year 1963?

A. I respectfully decline to answer on the grounds that my answer may tend to incriminate or degrade me.

Q. Mr. Riley, can you tell the ladies and gentlemen of the Grand Jury, sir, what was happening in respect to the Riley Management Company on June 22nd, 1962?

A. I respectfully decline to answer on the grounds that my answer may tend to incriminate or degrade me.

Q. Is that date particularly memorable to you?

A. I respectfully decline to answer on the grounds my answer may tend to incriminate or degrade me.

Q. Is that the date, Mr. Riley, that you drew checks on the account of the Riley Management Company in the total amount of eleven thousand, one hundred and ten dollars?

A. I respectfully decline to answer on the grounds my answer may tend to incriminate or degrade me.

Q. And that total being the total of eight separate checks?

A. I respectfully decline to answer on the grounds that my answer may tend to incriminate or degrade me.

Q. Isn't it true that of those eight checks seven of them, seven checks were charged on your books and records to legal expenses in connection with the North Lake King Arthur Development?

A. I respectfully decline to answer on the grounds my answer may tend to incriminate or degrade me.

Q. You didn't pay eleven thousand dollars in legal expenses on June 22nd, 1962, did you, Mr. Riley?

A. I respectfully decline to answer on the grounds my answer may tend to incriminate or degrade me.

Q. Is Joe Shine a lawyer?

A. I respectfully decline to answer on the grounds that my answer may tend to incriminate or degrade me.

Q. Did you ever pay any lawyer at El Morocco Lounge?

A. I respectfully decline to answer on the grounds my answer may tend to incriminate or degrade me.

Q. Is Leo Shibaiba a lawyer?

A. I respectfully decline to answer on the grounds my answer may tend to incriminate or degrade me.

Q. Did you put this money in your own pocket?

A. I respectfully decline to answer on the grounds my answer may tend to incriminate or degrade me.

Q. Did you pay tax on any of that eleven thousand dollars?

A. I respectfully decline to answer on the grounds that my answer may tend to incriminate or degrade me.

Examination by Mr. Betar.

Q. What kind of occupancy do you have in the King Arthur Apartments?

A. I respectfully decline to answer on the grounds my answer may tend to incriminate or degrade me.

Q. Any hoodlum occupants?

A. I respectfully decline to answer on the grounds my answer may tend to incriminate or degrade me.

Q. Do you have a dog?

A. Yes, I do.

Q. How is he feeling?

A. Not too good.

Q. Take him to the vet?

A. Yes, we just got her out yesterday.

Examination by Mr. Bailey.

Q. Mr. Riley, let me show you a photostatic of the check drawn on the account of the Riley Management Corporation, Check No. 18910, dated June 22nd, 1962 made out to the order of William J. Riley in the amount of five thousand dollars and signed William J. Riley, that is a check drawn on your account to the LaSalle National Bank in Chicago.

What happened to the five thousand dollars, Mr. Riley?

A. I respectfully decline to answer on the grounds that my answer might tend to incriminate or degrade me.

Q. Is that your signature? Is that your signature?

A. I wonder if I could talk to my counsel again.

Mr. Bailey: You certainly may.

We will have a short recess.

(A short recess was taken.)

Mr. Bailey: Miss Reporter, would you read back the last question, please.

(Whereupon the desired portion was read by the reporter.)

The Witness: A. I respectfully decline to answer on the grounds my answer may tend to incriminate or degrade me.

Mr. Bailey: Q. And I now show you a non-negotiable voucher representing the same check No. 18919 of the Riley Management Corporation, sir, your corporation, in the sum of five thousand dollars payable to William J. Riley. Is that,

sir, a record, a business record of the Riley Management Corporation?

A. I respectfuly decline to answer on the grounds that my answer may tend to incriminate or degrade me.

Q. And does it show on that record that William J. Riley received five thousand on June 22nd, 1962, sir?

A. I respectfully decline to answer on the grounds my answer may tend to incriminate or degrade me.

Q. Mr. Riley, on your tax return, the tax year 1962, did you show this five thousand dollars as income?

A. I respectfully decline to answer on the grounds that my answer may tend to incriminate or degrade me.

Mr. Betar: Mr. Riley, do you intend to give the same answer that you have been giving, declining to answer on the grounds of the Fifth Amendment to each and every question which we may ask you about the Riley Management Corporation or King Arthur Apartments or any payments of monies out of the Riley Management Corporation?

A. Yes.

Mr. Bailey: Q. Mr. Riley, is it your desire to protect someone who received this money? Is that the reason for your refusal to answer questions?

A. I respectfully decline to answer on the grounds my answer may tend to incriminate or degrade me.

Q. Are you afraid of Joe Shine?

A. I respectfully decline to answer on the grounds that my answer might tend to incriminate or degrade me.

Q. Are you afraid of Rocco Pranno?

A. I respectfuly decline to answer on the grounds my answer may tend to incriminate or degrade me.

Q. Did you keep this money?

A. I respectfully decline to answer on the grounds my answer may tend to incriminate or degrade me.

Mr. Bailey: I have no further questions.

Mr. Foreman, you may excuse the witness.

(Witness excused.)

(Which were all the proceedings heard in the above-entitled matter.)

EXHIBIT NO. 3500-0-1

WILLIAM G. RILEY, called as a witness by the Grand Jury, having been first duly sworn, by the Foreman, was examined and testified as follows:

Examination

By Mr. Schippers:

Q. Would you state your full name, please, sir? And spell your last name for the record.

A. William G. Riley, R-i-l-e-y.

Q. Mr. Riley, you were in the construction business, is that correct, sir?

A. That is correct.

Q. Did you give a sworn statement to agent John Walsh and Wallace Oshiro?

A. Yes.

Q. Did you give that statement on or about the 28th day of November?

A. Yes, I did.

Q. And did you sign that on or about the 28th day of November?

A. Yes.

Q. Mr. Riley, I show you the two pages marked Grand Jury Exhibit No. 110, and ask you if that is one of the statements—if that is the statement to which you refer?

A. Yes, it is.

Q. You notice on that, on the second page it was typed the 29th day of November. That is incorrect, is that right, sir?

A. Correct.

Q. As a matter of fact, you signed it today?

A. I signed it today.

Q. Would you read that statement to the ladies and gentlemen of the Grand Jury.

A. "I, William G. Riley, age 39, do solemnly swear that the statements made on the following two pages are true and correct and to the best of my recollection, I

further state that I have given this statement freely and voluntarily to special agent John M. Walsh, Intelligence Division, Internal Revenue Service. And that no threats or promises have been made to me in connection with the statements made herein.

"In late June, 1962, Dave Evans told me that Joe Shine had been into the rental division office in Northlake that day, and put a $50 deposit on an apartment. When the balance of the rental came due on the apartment in * * *

* * *

"The next time I met with Shine at Polarmo's office, I asked him for the rent. Shine said, 'Don't worry about it, I will get it for you.' Shine did not pay his rent.

"The next time I saw him, I asked him again for the rent. Shine said, 'Go blank yourself. Come on, what, are you kidding? Or something.'

"I told Shine that he had forced me to pay off to hire their subcontractors, and now I had to give him an apartment. I said, 'Joe, where is it going to end?' Shine kept saying, 'Don't bother me, you have got lots of money.' I told Shine that the rent from the apartment had to be paid to the owner, and that it was costing me money.

"From June 1, 1962 through June 30, 1965, Shine occupied the apartment in Building 27, but paid no rent other than the $50 deposit which he had made. Every month when the rental was collected, by rental division due, to be paid over to the owner of that particular building, I would have to take the $139 rent which Shine had not paid from my miscellaneous construction fund and place it into the rental division fund to make up the total rentals due the owner of Building 27. This was done every month, starting with July, 1963 through and including June, 1965. Time after time when I asked Shine for the money, he told me that it was costing" excuse me—"Time after time I asked Shine for the money and told him that it was costing me that money for the rent which he was not paying me.

Shine in reply said 'Oh, come on, you have got lots of money.'

Signed: "William G. Riley, subscribed and sworn on the 28th day of November, 1966."

It is further signed by John Mr. Walsh, special agent, and Wallace Oshiro, special agent.

Q. You gave that statement freely and voluntarily, did you, sir?

A. Yes, sir.

Q. Mr. Riley, I show you a photograph marked Grand Jury Exhibit 1000, for identification, and ask you if you can identify the person whose photograph appears therein?

A. That is Joe Shine.

Q. That is the man to whom you are referring in this testimony, is that correct, sir?

A. That is correct.

Q. I now show you what has been marked as Grand Jury Exhibit No. 11 for identification, which is a 10-page statement purporting to be a 10-page statement of yourself, and ask you if you made that statement?

A. Yes, I did.

Q. And did you sign that, also, today?

A. Yes, I did.

Q. And you will notice, sir, that again they typed in the 29th. That is in error, is it not, sir?

A. That is correct.

Q. It was actually typed today?

A. Today.

Q. That was given and signed voluntarily and without any compulsion or duress?

A. That is correct.

Q. Read that.

A. "Sworn statement of William G. Riley.

"I, William G. Riley, age 39, do solemnly swear that the statements made in the following 10 pages are true and correct, and to the best of my recollection. I further state that I had given this statement freely and voluntarily to

special agent John M. Walsh, Intelligence Division, Internal Revenue Service; and that no threats or promises have been made to me in connection with the statements made herein.

"In 1960, I formed the Riley Management Corporation, Bellwood, Illinois. From 1960 through 1965, I was president, majority stockholder of the Riley Management Corporation.

"In the late winter or early spring of 1962, Frank Falecie, building contractor, came to me with a proposition for a second King Arthur development in Northlake. He told me he had the site in Northlake, Illinois, and could obtain the financing. That he had constructed buildings in Northlake and could obtain the proper zoning in Northlake. His proposition was that he would build the project, and I would sell the buildings and manage the apartments. This proposition greatly interested me. So I commenced to survey the practicability of such a project as to sales and rentals, and told my attorney, Francis Faris, to investigate with Falecie the feasibility of obtaining the necessary Northlake zoning and annexation ordinances.

"Approximately one week after commencing to investigate the possibility of a second King Arthur development, I received a telephone call from Geno Polarmo, a partner of Melrose Park Plumbing Company. Geno said, 'Come on over tomorrow morning at ten. Nick wants to see you.' I told Geno I would be there.

"The next morning I drove to the office of Melrose Park Plumbing Company and entered the office where I met Geno Polarmo. Geno took me into Nick's office where he introduced me to Nick Polarmo. Geno then left the office, and Nick said, 'Bill, I want you to meet Joe Shine. Joe, this is Bill.'. I shook hands with Shine, and for the first minute or two of the meeting, we merely passed pleasantries. Polarmo then asked me if I was planning a project in Northlake. I told him I was thinking about it, but it was still in the planning stage. Polarmo got up and said, 'Planning blank. What the blank do you think you are

doing in Northlake? Don't you ever learn? Shine then said, 'Don't you know that Northlake is our town? We have got Northlake. Nobody can approve anything in Northlake except me. I'm the man to see.'

"Polarmo said, 'Why didn't you tell me? You don't do anything in Northlake without us.' I said, 'Nick, listen. It is just in the planning stages. I haven't done any of the work. It is just in the planning stages.'

"Polarmo said, 'You don't move a shovel out there without us. Without us, you can't do anything.' Shine again said, 'I am the man out there you want to see. I am the guy that runs that town.'

"I told Polarmo and Shine that the project was something only in the preliminary stages, that I had a lot of work to do on the thing. I also told Polarmo and Shine that my attorney had met with Mayor Nearey, and that Falecie was going to handle the deal. Shine got up screaming and said, 'I am the man. The Mayor can't do anything without me. You saw the wrong guy. That is our town. You do business with us. It will cost you $70 grand to build in Northlake. Without us, you have got nothing.'

"Polarmo said, 'You can build the building in the middle of the street if you want to, and no one will bother you. But without us, you don't turn a shovel.' I told Shine and Polarmo that I had—that I would build a good building, but Shine said, 'I don't care what kind of building you are going to build. You don't turn a shovel without us in Northlake. That is our town.'

"I said, 'Listen, I am not even sure I am going to go with this thing yet. I have got a lot of work to do on this thing yet.' Polarmo and Shine waived these statements aside. Polarmo said, 'What are you, some kind of a smart blank punk, or something? Of course you are going to build it,' I said, 'Listen, I have got to talk to my attorney about this.' Shine said, 'You don't have to talk to blank. We want 70 grand or you don't turn a shovel out there.' I told them that I didn't know yet if I would build the

project. But they had the project already started. I told Polarmo and Shine that the deal was not made yet, and that I could not come up with that much money. Shine said, 'I have got to have 30,000 in cash right away to take care of my Northlake people. The nuts over there have to have their money right away.'

"Polarmo said, 'Don't forget, you are not going to move in Northlake. If you do, we will pull your subcontractors in Addison.'

"Shine said, 'No permits. You don't get nothing in Northlake until we get the 30 grand cash.' Polarmo turned and said to Shine, 'I made this guy. Now, look what he is trying to do.' Shine said, 'You don't do business with nobody in Northlake but me. I am the man.'

"I then received numerous phone calls from Shine concerning the Northlake Project. Approximately one week after the first meeting with Polarmo and Shine, I again met them at Nick's office. Shine said, 'How is the project coming? Have you got the money?' I said, 'Listen, Joe, I haven't even started this thing yet. I don't have a land loan yet.'

"Shine said, 'What the blank, are you a wise guy or something? We can get the zoning for you.' I said, 'I don't need the zoning yet. I am still in the planning stages.' Shine said, 'Listen, I need $30,000 cash, now, to take care of my Northlake people.' I said, 'Listen, you guys, I don't even know if I am going to build this yet and you want money. There isn't any money yet.'

"Polarmo said, 'Listen. The Addison project is going pretty good. You don't want trouble out there, do you?' I said, 'No, I don't want trouble, but I am not ready to go yet.' Shine said, 'Get the money together, and we will get the zoning for you. It is our town.'.

"Polarmo said to Shine, 'Look at this guy. I made him at Addison, and now he is trying to con us.' Shine said, 'Nearey is our guy. I will take care of Nearey.'

"Numerous additional meetings were held over a period of weeks with Polarmo and Shine. Polarmo kept telling

me how he made me in Addison and how he could stop me cold in Addison and Northlake. Polarmo and Shine kept telling me that we had a deal, and I kept telling them that we didn't. During these meetings, I kept trying to tell Polarmo and Shine that Northlake was not definite, and in the event it was, I would not be the builder, only the selling and renting agent. No matter what I said along these lines, they took the position that the Northlake project was a reality. Shine kept saying, 'It will cost you $70,000 to build in Northlake. When we get the 70,000, you have the okay. And with my okay, you can get the zoning and build any way you want.'

"I told him that I wasn't interested in building junk. But he just waved this aside and said, 'I don't care what kind of a building you build, you don't turn a shovel in Northlake without us. That is our town. I have to have the 30,000 cash, now, for the nuts over in Northlake. The other 40,000 you can pay me in checks to legitimate companies.'

"I said, 'Joe, I don't have the money yet. I haven't opened up the loans yet, and I might not even go ahead with the project.' Shine said, 'These guys got to have their money. They need their money. They are going on vacation.' Polarmo said, 'You have got big people behind you, now, Bill. You have got it made, now. You have got big people behind you.'

"At these meetings I kept telling Shine and Polarmo that my loans were not opened yet; I had engineering work to do, I had numerous things to do, and if they kept—if I kept coming over here to the meetings, I would never get the project off the ground. Shine then said, 'What the hell am I going to tell the man?'"

"On another occasion during this four- to six-week period, prior to May 25, 1962, I received a call from Nick Polarmo. Nick said, 'Bill, come on over, I want to see you.' I said, 'Nick, I haven't got the money, I have got things to do; I got a business to run. I haven't got the money.' Nick said, 'Come on over, we have got to see you.'

"When I arrived at Polarmo's office, Shine was sitting there, and I barely got inside the door when Shine said, 'Where the blank is the money?' I said to them, 'I just told you over the phone I don't have the money.' And they would just sit around and talk to me about the money. I kept telling them that I had a business to run, and that they had me going nuts worrying about these things. The conversation would always get back to the point where Shine would say, 'Where the blank is the money?'

"I then said to Polarmo and Shine, 'Let me see if I can explain this to you: First, I have got to get a land loan. Then, I have got to do this. Then I have got to do that. After I got through the whole process, Shine then looked at Polarmo and said, 'Where the blank is the money? What is this guy doing to us?'

"During this time, I received a telephone call every two days from either Shine or Polarmo who said they had to see me right away. When I would get to Nick's office, the first thing Shine would say is, 'Have you got the money? Where is the money? We made a deal. Where is the money?'

"I kept telling them there was no deal. That the engineering had not yet been completed, and that I had no loans yet. By this time, I was scared because I knew they had taken the position that I owed them $70,000 whether I went ahead with the Northlake project or not. I was also afraid that Nick would stop the Anderson project, which would have put my company out of business.

"In May, 1962, I received a tentative approval for a land loan from the First Federal Savings & Loan Association of Berwyn which was subject to proper zoning and subdividing. A day or two later, I was again called to Nick's office by Shine and Polarmo. I told them about the tentative loan approval, and attempted to explain the details in perfecting a land loan. At this time, they became more demanding, and Shine said, 'Have you got the money? Where the blank is the money?' I told them that I could

not get them the $30,000 until after the land loan opened. And to open the loan, I would have to have the proper zoning and subdividing.

"Shine said, 'You are not going to get blank until we get the 30,000 cash. You are not going to do nothing until we get the money. You will get your zoning when we get the $30,000. You will have your zoning like that—snapping his fingers—when the Northlake nuts get their money. When the Northlake nuts get their money, you get your zoning, not before, do you understand? No money, no zoning.'

"I was now backed in a corner because I didn't have the 30,000. On May 25, 1962 I authorized the issuance of a $5,000 check payable to myself, charged against legal fees. I endorsed this check, and then directed my office manager, John O. Hutchison, to take this check to the LaSalle National Bank and cash it and bring the cash back to me. Hutchison did cash the check, and on the same day returned the cash to me at my office at the Riley Management Corporation. When Hutchison had returned from the bank with the $5,000 in 10- and 20-dollar bills, I called Nick Polarmo at his office and said, 'Nick, I have got some money.' Nick said, 'Come over, we will be waiting.'

"When I arrived at the office of Melrose Park Plumbing and went into Nick's office, Shine was there waiting for me. I handed the envelope containing the $5,000 in cash to Shine. He opened the envelope, took out the money and said to Nick, 'What is this guy trying to pull? Here we are trying to make him a living, and what is he trying to do? Look at this. $30,000 we told him to have, and look at this. I want the rest of the money. Where is the money?'

"I said, 'Joe, listen, I haven't got the money. I will get it as soon as I can. I haven't got the money.'

"From May 25, 1962 to June 22, 1962, I received telephone calls daily from Shine and Polarmo asking me to come over to the office of the Melrose Park Plumbing Company because they wanted to see me. I kept stalling them and telling them that I didn't have the money, and

Shine then began to make regular visits to my office, always asking me where the money was and demanding it.

"A week or so after the Northlake Council—the Northlake City Council had passed the annexation ordinances and the rezoning ordinance pertaining to the property which I had in Northlake, subject to official signature. I authorized the issuance of Check No. 18910, dated June 22, 1962, payable in the amount of $5,000. I cashed this check at the LaSalle National Bank and returned to my office with it. I then authorized the issuance of Checks Nos. 18923-24-25-26-27, all payable to cash in the amount of $1,000 each.

"The next time Shine called, which was on the same day, June 22, 1962, I told him that I had some money for him. Shine came over to my office, took a look at the money I had for him in the five $1,000 checks, and said, 'Where is the rest of it? The nuts in Northlake need their money. Where is the rest?'

"I said, 'Joe, this is all I can get. You have got $5,000 in cash and you have got five $1,000 checks. Hold on to the checks for two or three days because there isn't enough money in the account to cover them. Don't cash the checks right away.'

"I then authorized the issuance of Check No. 19864 payable to myself dated August 1, 1962, in the amount of $7,500.00. I cashed the check at the LaSalle National Bank, returned to my office, and told Shine the next time he called to come over because I had some money for him. On the same day, August 1, 1962, Shine came to my office where I gave him the $7,500.00 in cash. Shine and Polarmo continued to hound me for the balance of the funds.

"So on August 9, 1962, I authorized the issuance of Check No. 20091 payable to myself dated August 9, 1962, in the amount of $7,500.00. I cashed this check at the LaSalle National Bank, returned to my office, and on the same day, August 9, 1962, handed this $7,500.00 in cash to Shine in my office.

"I now had paid Shine the $30,000 he requested. Polarmo and Shine agreed that the balance of the funds which I had to pay them amounted to $40,000 which would be paid directly to them in the form of checks. I then obtained a land loan on the Northlake property and began to go forward with the job. Shine and Polarmo continued to call me daily asking for meetings and said they wanted to see me, but I managed to stall them to the point where I could meet them on every third day.

"For approximately one month, I was not contacted by either Shine or Polarmo concerning the $40,000 which they said I still owed them. In the latter part of September, 1962, I received a call from Shine. He said, 'How are you doing, Bill, about the rest of the money? Can I come over and see you Monday morning?'

"I then attempted to stall him and said, 'No, I don't have the money, you will have to put it off until the end of the week.' Shine then said, 'What is the trouble, Bill?' I told Shine that I was having trouble opening the building loans, and that there was a lot of work involved before a building loan could be opened. I told Shine that I could not come up with the $40,000 at one time, but that I probably could stand $500.00 a week. Shine said, 'That is okay, Bill, that sounds okay to me.'

"A few days later, Shine called again and said, 'Bill, can I come to you to see you this morning?' I again stalled Shine and said, 'Not yet, Joe, I haven't got the money yet.' Shine said, 'All right, I will be in Monday.'

"These telephone conversations and visits continued to October 1, 1962 when the construction loans were actually opened. On October 1, 1962, Shine came into the office. I told him that I had some money for him. Shine said, 'Where is the money?' I said, 'Joe, have you got the invoice? Have you got something I can write a check to?' Shine said, 'No, I ain't got nothing. I will get it for you next week.'

"I then instructed my office manager, John Hutchison, to prepare a check and said, 'Joe, what do you want

the check made out to?' Shine said, 'J & S Engineering Company.'

"When Hutchison had prepared the check, I signed it and gave it to Shine. On the folowing week on or about October 8, 1962, Shine again came into the office and said, 'Where is my check, Bill?' I asked Shine who he wanted the check made out to. He said, 'J & S.' I said, 'Joe, do you have the invoices?' Shine said, 'No, I will get them for you.'

"I authorized the issuance of a check payable to J & S Engineering. I signed the check and gave it to Shine. The two aforementioned J & S Engineering checks Nos. 21184 and 21326 were both payable to J & S Engineering Company in the amount of $500.00.

"On October 15, 1962, when Shine again came into the office, he said, 'Bill, don't use that J & S name any more. Here, use the name of L & J Landscaping Service. Here is an invoice.' The invoice which Shine gave me bore the name of L & J Landscaping Service. I authorized issuance of the following checks in lot numbers in the amount of $500.00:

"21461, 21564, 21722, 21869, 21993, 22125, 22255, 22380, 22521, 22617, 22667, 22854, 22868, 23012, 23126, 23226, 23332, 23498, 23628, 23774, 23904, 24040, 24127, 24257, 24347, 24677, 24783, 24920, 25091, 25233, 25330, 25446, 25579, 25726, 26757, 26918.

"Normally, when Shine came into the office weekly to pick up his $500.00 check, I would be there to give it to him. However, on several occasions when I was absent from the office, I would leave the check in an envelope with my personal secretary, Marzetta McGillicutte, with instructions to give the check to Shine. Marzetta McGillicutte would then give the checks to Shine when he came into my office.

"During the summer of 1963, it became apparent to me that the L & J Landscaping Service was a phoney company, and I began to worry about the checks that were issued

to the company. I told Shine that we would—that we were putting too much money on the one account, and to come up with the name of a legitimate company that I could issue checks to.

"On August 21, 1963, when Shine came into the office to pick up his check, he said, 'Don't use that L & J name any more. Here, here is an invoice. Use the name Dennis Company. Use the name—you know, Dennis Company.'

"From August 21, 1963 through December 30, 1963, I authorized the issuance of the following $500.00 checks payable to the Dennis Company for which I had received an invoice from Shine. The check numbers are: 27007, 27152, 27224, 27383, 27507, 27654, 27816, 27959, 28071, 28176, 28307, 28427, 28583, 28743, 28916, 29016, 29229, 29335, 29427, 29560.

"With only one exception that I specifically recall, all of the J & S, L & J, and Dennis Company checks were picked up by Shine at my office. On one occasion I recall taking the check to Shine at the El Morocco Lounge.

"On January 14, 1964, at the insistence of Shine, I authorized the issuance of Check No. 29892 payable to the L & J Landscaping Service in the amount of $1,000 which I gave to Shine. This was the final payout which I made to Shine on the Northlake King Arthur payoff. In addition, the moneys which—in addition to the moneys, which I was forced to pay Shine to construct the King Arthur project in Northlake, Polarmo forced me to hire certain contractors on this job. They were as follows:

"Scalvitti Sewer & Water Main; Sam Cerniglia; Gail Tyle; Birchwood Plastering; Melrose Park Plastering; Melrose Park Painting Company; the Division Heating Company.

"Late in 1964, after I had been visited at my home by Special Agent John M. Walsh, Intelligence Divison, Internal Revenue Service, and where Walsh showed me certain checks which had been endorsed by Joe Amobil, Wayne Sidler, and Leo Schababy—the latter two Northlake Aldermen.

"I went to see Shine and Polarmo at Polarmo's office. I attempted to get Shine to realize that I was in serious trouble with the Internal Revenue Service. All Shine said was blank them, burn the records. Polarmo said 'You mean to tell me you showed them the checks?' I said, 'What do you mean, show them? Do you guys come from Mars or something? How do you think you show something like this? All these checks go on the books. Here, I figure you guys had some brains, and then you come in and show me a check that has been signed by Schababy. What are you people, crazy or something?'

"Polarmo said, 'Don't let those guys blank blank—they can't do anything. They have been trying to get us for years.' Shine said, 'Don't tell them anything. You know what happens to guys who talk, don't you?' I said to Polarmo and Shine, 'What is the matter with you guys? On one hand you tell me you will kill me if I don't pay you the money; on the other hand, these guys tell me they will put me in jail. But if I don't tell them that I paid you the money, that is what I am worried about.'

"Shine said, 'What are you going—' excuse me—Shine said, 'You are not going to tell them anything, are you? You haven't told them anything, have you?'

"I said, 'Joe, don't be nuts, I am not going to tell them anything.' Shine said, 'Don't you tell them anything.'

"In late 1964 or early 1965, I hired Leo Schababy, Northlake Alderman, as a lister in my Rental Division. In the course of a training conversation, I told Leo about the mess the company was in and how concerned I was over the Internal Revenue Service investigation. I told Leo that there was a $1,000 check issued on June 22, 1962 which I had given to Shine which bore his endorsement, which I thought was real dumb. Leo admitted that he had received the check from Shine, and that each of the 10 Aldermen received $1,000. He said that if the Internal Revenue Service asked him about the check, he was going to tell them that he got it for doing painting work. I

explained to Leo that my books and records did not show this check as having been paid for painting work, but he didn't seem to care.

"(Signed) "William G. Riley, signed and sworn this 28th day of November."

By Mr. Schippers:

Q. I will show you what has been previously marked as Grand Jury's Exhibit No. 112 for identification, which consists of a four-page statement, and ask if you gave that statement?

A. Yes, I did.

Q. Did you sign that?

A. Yes, I did.

Q. On or about the date it bears, the 28th day of November?

A. Yes.

Q. Will you read that statement, please.

A. "Sworn statement of William G. Riley.

"I, William G. Riley, age 39, do solemnly swear that the statements made in the following pages are true and correct to the best of my recollection.

"I further state that I have given this statement freely and voluntarily to Special Agent John M. Walsh, Intelligence Division, Internal Revenue Service.

"That no threats or promises have been made to me in connection with the statements made herein.

"In 1960, I began the business known as the Riley Management Corporation. From 1960 through 1965 I was president of the Riley Management Corporation and majority stockholder.

"In 1960, I conceived the idea of constructing multiple dwelling units along a pattern never used before in the Chicagoland area. I designated the name of this apartment project as the King Arthur Apartments, and began looking for unimproved real estate on which to build this project. I found an area suitable to my needs in Addison, Illinois.

"Over a period of months I met several times with Addison, Illinois officials concerning the project and ordinances needed from Addison before I could begin this project.

"After having spent considerable time and investing a large amount of money in this project, the Addison Zoning Board recommended to the Village Board that the project be approved. I estimated at this time that I had approximately $100,000 invested in this project, although I had not yet broken ground.

"Well, my King Arthur project was taken before the Addison Village Board for approval. The project was tabled until such time as the Sewer and Water Committee could study the project. Once the Sewer and Water Committee began looking into the project, I began to encounter real problems. In my opinion, their recommendations and asking for sewer mains and water mains were unreasonable, and not relevant to the project at hand. I refused to meet the demands of the Sewer and Water Committee. And as a result, the Committee failed to give my project their approval and recommended the Village Board not to resubdivide the property as I requested.

"I then hired an engineer to re-work the plans so that the buildings could be built on the existing subdivision plot. I then took the new plan before the Village Board to obtain building permits. During the next meeting of the Addison Village Board, Mayor Robert McHugh looked over the new layouts, saw that they were changed, and that the project could be built according to the existing subdivision, and became incensed. He asked me what I was trying to do and told me that I would never build in this town. I explained to the Village Board about the expenses which I had already incurred in attempting to get this project off the ground, and told them that unless they issued permits I would be out of business. The Board refused to issue my permits.

"While attempting to obtain the necessary permits from the Villiage of Addison, I had hired Anthony Novelli as

my building superintendent on the Addison project. Novelli had been working on a full-time basis attempting to get all the subcontractors lined up. Two or three days after they, the Village Board of Addison, had turned down my request for building permits, he came to my office in Bellwood, Illinois and told me that he had heard that if I hired the Melrose Park Plumbing Company to do the plumbing work in the Addison project, that I would be able to obtain the Addison building permits.

"I discussed this matter with my business associate, Francis Faris, who is also the attorney for the company, and with the prospect of losing the $100,000 I invested in the project—I asked Faris and Novelli to go to the Melrose Park Plumbing Company to see what they could find out. Faris and Novelli did go to the Melrose Park Plumbing Company where they met Nick Polarmo, a partner of the company. Faris discussed the King Arthur project plans with Polarmo and told him of the problems they were encountering in obtaining building permits.

"Faris also told me that he asked Polarmo what his plumbing price was per building, and all Polarmo would tell him was that his prices were in line.

"Faris told me that Polarmo told him that if he wanted to get the project started, he had to get the plumbing project. Faris tentatively agreed to this deal and told Polarmo that he had to discuss it with me, but Polarmo brushed this aside and said, 'This is a deal,' and then made a telephone call to Pat Rawlings who was a member of the Building Committee of the Village of Addison, and told Rawlings to 'get his—' it was left out—'over to Polarmo's office.

"A short time later, Rawlings showed up at Polarmo's office, and Polarmo told him to issue Riley building permits because Riley was going to start building tomorrow. Within two or three days or a week, the building permits which I had requested were issued by the Village of Addison. And hearing this, I then ordered that the project

immediately begin, and so directed Anthony Novelli. Novelli began the Addison project, and for approximately six weeks, the project ran with no problems. Novelli did obtain three or four building permits, and everything seemed to be running smoothly.

"After the project had been under way for approximately six weeks, August or September, 1962, Novelli came into my office and told me that he had been approached by an individual known as Jimmie Saviola. Novelli reported to me that Saviola had told him that they were supposed to have been taken care of in Addison. Novelli stated that he thought this meant that the Addison officials had to be taken care of, and asked me what he should do about it. I called Francis Faris into my office, discussed this matter with him, and told him (Faris) to meet with Saviola and find out what was going on. Faris and Novelli then met with Saviola, and Faris reported back to me and told me what had taken place. Faris stated that he had met Saviola at the Terrace Restaurant on Lake Street, south of Addison Road in Addison, and that Saviola said that the Addison people had to be taken care of.

"Faris told me he told Saviola he thought the deal for the Addison buildings only included the company using the Melrose Park Plumbing Company as a subcontractor.

"According to Faris, Saviola then said, 'Why didn't you tell me you were Batter's man?' Saviola then told Faris and Novelli that it was up to them to decide how much it was worth to keep the Addison officials happy. Faris and I then decided that rather than rock the boat, we would pay Saviola $1,000 a building, or a total of $13,000.

"Beginning in the late summer, early fall of 1961, and continuing over the next 18 months, I authorized the issuance of several checks totaling $13,000 payable in cash to myself or Francis Faris, which checks were cashed by Faris. Then the cash was given to Saviola, either at the Terrace Restaurant or the Countryside Liquor Store in the Addison Shopping Center.

"During this 18-month period, the Addison project construction was under way; Saviola called Faris on a number of occasions and would ask him for money. A period of time would pass—sometimes as long as two or three weeks—when Novelli would come into the office and tell me that Saviola was around again—sometimes as long as two or three weeks. That the Addison officials were around again, and asked me if I owed Saviola some more money. I would then authorize the preparation of a check which I would give to Faris to be cashed and passed on to Saviola. Check No. 13240, drawn on the account of the Riley Management Corporation at the Elmhurst National Bank, dated October 16, 1961, payable to cash in the amount of $3,000 is one of the checks which I authorized to be issued in cash, the proceeds of which Faris told me he paid to Saviola. The reverse side of this check bears the endorsement of Francis Faris, Junior, and I recognize this signature as that of Francis Faris.

"Check No. 18921, dated June 22, 1962, payable in cash in the amount of $1,000 drawn on, for account at the La Salle National Bank is one of the checks which I authorized to be issued and cashed, and the proceeds which Francis Faris gave Saviola. The endorsement on the reverse side of this check reads: 'Francis W. Faris, Junior,' is the endorsement of Francis Faris.

"I authorized Francis Faris to pay Saviola $13,000 on the Addison, King Arthur project because I was afraid that if I did not make these payments to Saviola, I would encounter problems from the Addison officials, and stood to lose more than $300,000 which I had already invested in this project.

"The initial deal which Faris had made with Polarmo in order to get the Addison building permits was for me to hire the Melrose Park Plumbing Company and to do the plumbing work on the Addison project. As the project progressed to the point of awarding other contracts, Nick Polarmo sent other subs that he wanted hired to the con-

struction site to see Novelli. Novelli would then refer the subcontractors to me. I asked them—forget that—I talked to them and told Novelli to hire them or give them the subcontract work if their price was right.

"In my opinion, the prices charged by the subcontractors referred to me by Nick Polarmo were in line. However, after they began working on their project—on the project, they were great for charging extra for work done. The pressure to hire the subcontractors referred to me by Polarmo came through Anthony Novelli on the construction site.

"Within days after construction commenced on the Addison project, I met Geno and Dan DePirro—I mean Geno Polarmo and Dan DePirro of the Melrose Park Plumbing Company, and they told me that part of the deal was that they would get the electrical and heating work on the project. I told them that no such deal had been made, and Geno said, 'Yes, it was.'

"As a result of these pressures, I did award the work on the Addison project to the Melrose Park Company on the electric, and a portion of the heating work to Division Heating, another subcontractor referred to me by Polarmo.

(Signed) "William G. Riley."

Mr. Schippers: Thank you, Mr. Riley.

Will you continue his subpoena?

The Foreman: Yes. Your subpoena is continued generally.

(Whereupon, no further proceedings were had before the Grand Jury this day.)

(In Re Grand Jury Investigation)
Grand Jury No.
65 GJ 2395

BEFORE THE FEDERAL GRAND JURY

Tuesday, November 29, 1966 2:00 o'clock p.m.

The Grand Jury reconvened pursuant to adjournment.

Present: Mr. Joseph Lamendella
Mr. David P. Schippers
Mr. Sam Betar
Assistant United States Attorneys.

WILLIAM G. RILEY, called as a witness by the Grand Jury, having been first duly sworn by the Foreman, was examined and testified as follows:

Examination.

By Mr. Joseph Lamendella:

Q. Will you state your name, please, sir?

A. William G. Riley.

Q. Are you the same William G. Riley who testified here yesterday?

A. Yes, I am.

Q. Mr. Riley, let me show you what has been marked G.J. 113.

What is that?

A. That is the statement I made to Mr. Walsh.

Q. Was that statement made on the date it shows, sir, on Page 2?

A. It was made today. If today is the 29th, it is on the same day.

Q. Did you sign that statement?

A. Yes, I did.

Q. Did you initial each page?

A. Yes.

Q. Read that.

A. "I, William G. Riley, age 39, do solemnly swear that the statements made in the following pages are true and correct to the best of my recollection. I further state that I have given this statement freely and voluntarily to Special Agent John M. Walsh, Intelligence Division, Internal Revenue Service, and that no threats or promises have

been made to me in connection with the statements made herein.

"I further state that during the years 1960 through 1965, I was the president and majority stockholder of the Riley Management Corporation, Bellwood, Illinois.

"In the summer of [illegible] I found some property contiguous to Westmont, Illinois which was suitable for another King Arthur Apartment Project. Anthony Novelli, an employee, came to me and told me that he thought he could get the necessary zoning, annexation, and permits for the project, and that he would attempt to keep the "hoods" out of it. I was now convinced that the only way I could proceed with my company operations was to break away from Nick Palermo and Joe Shine. So, I told Novelli to go ahead and see what he could do and subsequently I attended several meetings with Westmont officials and explained my proposed building plans. The officials appeared to be enthusiastic about the plans.

"Prior to beginning the Westmont King Arthur project, I received a telephone call from Joe Shine who said, 'I want to see you at the apartment, come on over.'

"I went to Shine's apartment located in the King Arthur Northlake Apartment Project, Building 27, Apartment 304, and knocked on the door. Shine opened the door, motioned for me to come in and when I got inside the room, saw that Nick Palermo was there.

"We said helo to each other and Palermo then jumped up, put his face directly into mine and said, 'What the blank do you think you are doing in Westmont? You are not going to move a shovel in Westmont without us. If you try to go out to Westmont without us, you will not only be stopped there but we will stop you cold in Northlake.'

"The Northlake King Arthur was still under construction at that time.

"Shine jumped up and said, 'Yeah, on top of that we will get the politicians on you and the building inspectors too.'

"Palermo said, 'I'll guarantee you another thing too—

you won't get any contractors to work in Westmont if you don't take us out there with you.'

"I told Nick that his company was already behind their work on the Northlake project, that they were slowing the Northlake project down and as a result of this slowdown, I was behind schedule in the opening of construction loans. I told Palermo and Shine that since they had nothing to do with the purchase of the land, the obtaining of the necessary zoning or permits and since Palermo's companies were doing such a lousy job and were in fact costing him money and because their work was inferior, I was not going to hire him on the Westmont job.

"Palermo again jumped up and said, 'You ain't making said 'You are a blank liar. Nobody does better work than I do. Nobody does it faster. Nobody does it cheaper,' and turning to Shine, he said, 'He's a blank liar.'

"I told Palermo that I just couldn't continue to build the projects with the three pipe trades that he was forcing upon me for doing such a lousy job.

"Palermo again jumped up and said, 'You ain't making a move without us. None. Nothing without us.'

"Shine then said, 'Where the hell do you think you are? You got the army and the navy behind you with us. You ain't got nothing to worry about.'

"Nick then chipped in again and said, 'You ain't going to turn a blank thing without us.'

"And at the same time Shine was gesturing in my face with a lighted cigarette as though to push it into my face.

"Palermo continued and said, 'Northlake won't go at all. Everything will stop without us. You get a plumber in Westmont and I'll stop you, you rotten little S.O.B. Where the hell do you get off with this?'

"I said, 'Look, I've had enough of this. I'm leaving. There is no sense in this kind of screaming. You guys don't even understand what I am up against. Can't you get it in your heads that I'm shaky. I am about to go under? I am broke. I just don't care any more. You are screaming for money. Don't you understand you are going to break me? If I give you Westmont, you will turn

around and say you can't do anything else until I pay you. I've got to go separately on this thing in order to keep my head above water.'

"Palermo kept saying, 'You are not going anywhere. Sit down, you punk.'

"On two or three occasions I got up to leave but Shine physically blocked the door so I could not leave, and when I did attempt to leave Shine said, 'Where the blank do you think you are going? Sit down. You are not going any place. What's this crap? You are not making a move any place without us.' Shine then said, 'Where do you think you got Westmont? You got it from us.'

"I said, 'Come on, Joe, you are nuts; I got it on my own. You had nothing to do with it. You guys are breaking me. Where the hell do you think I get this money? On trees? By the time I chase you guys around and waste my time with you, and you tell me I can build buildings in the middle of the street in Northlake and now all I've had is heat and problems. I am fed up with you. And now because of you guys working with me I can't get mortgages on account of you. If I wasn't tied up with you guys and everybody knows it, I could get mortgages any place, any time. I would have mortgage companies fighting to lend me money. But nobody wants anything from me or will give me anything because they find out you people are in with me. Do you think it is all profit? Don't you know business?'

"With this, Palermo got up screaming, again put his face into mine and said, 'That's a blank lie. Nobody is cheaper than me. Nobody does better work than me. What are you trying to do?' And all the time he was pounding the table and almost foaming at the mouth. At thi point Palermo got so mad that he said, 'What do you, what do you think, what am I.' He was so mad that he could not complete any sentence that he started and just kept going on and on like this.

"I told Nick that his plumbing work was no good; that I had leaks all over the Northlake and Addison project.

"Palermo turned to Shine and said, 'Blank, he is a

blank liar. He lies.' And then he would hiss through his mouth as though he was going to explode.

"After two hours of this continual shouting match with Palermo and Shine, I attempted to pacify them and offered to give Palermo a couple of the buildings in the Westmont project but not all of them.

"Palermo said, 'You'll give them all to me.'

"I said, 'But, Nick, you can't handle them. You don't have the people to do them. You are behind in your work now. Can't you talk about this nicely? Don't you know I'm not paying my bills? You guys are killing me. I'm having trouble opening loans, and as it stands now, and as it stands now I'm the only guy in the suburb who is selling his buildings. Don't you know I'm the only one creating sales?"

"Palermo said, 'You blank punk. It is because of us, not because of you. That's why, you stupid blank, blank. You have the army and the navy behind you.' Palermo then said, 'I'm going to bury that S.O.B. Hubley. I'm going to bury that guy.'

"In the meantime, I received a call from Nick Palermo. Palermo said, 'I want to see you at the office.' I went over to Palermo's office and he said, 'If you hire another contractor to do the work in Westmont, you are through. Nobody is going to show up on that job. I'll pull every man on Northlake and nothing will get done. Nobody will show up.'

"Rather than have both projects go down the drain, I gave Palermo the Westmont project."

Signed William G. Riley.

Q. Do you have any additions or deletions to this statement, Mr. Riley?

A. No, sir.

Mr. Lamendella: Mr. Schippers, do you have any questions?

Mr. Schippers: No questions.

Mr. Lamendella: Any member of the Grand Jury have any questions?

(No response)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. ~~27~~ 1

CASSIUS MARSELLUS CLAY, JR., also known as MUHAMMAD ALI,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

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No. .....

CASSIUS MARSELLUS CLAY, JR., also known as MUHAMMAD ALI,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

Opinions Below

The opinion of the Court of Appeals is appended hereto at pages 1a-48a. The judgment and the order denying rehearing are appended hereto at page 49a. Petitioner having been convicted upon trial by jury, no District Court opinion exists, but that court's oral finding of a basis in fact for petitioner's classification is appended hereto at pages 50a-54a.

Jurisdiction

Petitioner was convicted on June 20 and sentenced on June 21, 1967. The Court of Appeals affirmed the judgment on May 6, 1968. Petition for Rehearing or Rehearing en Banc was denied on June 6, 1968. The jurisdiction of this court is conferred by 28 U. S. C. § 1254(1).

Questions Presented

1. Whether the systematic exclusion of Negroes from petitioner's selective service boards resulted in the invalidity of the system's induction order, requiring reversal of a conviction based upon his refusal to obey such order; and, additionally whether the Court of Appeals erred in:

   a. Rejecting the analogy between selective service boards and racially discriminatory juries, instead analogizing discriminatorily comprised boards with malapportioned state legislatures;

   b. Ruling that petitioner had to prove specific acts of racial prejudice directed against him in order to render the induction order invalid;

   c. Ruling that petitioner had not been wrongly denied the right to discover evidence and subpoena witnesses to prove specific acts of racial and other prejudice against him;

   d. Failing to find that petitioner had proved specific acts of racial prejudice directed against him;

   e. Ruling that any errors made by racially exclusive selective service boards were corrected by the presence of a Negro on the three-member Presidential Appeal Board.

2. Whether petitioner was denied constitutional due process and the fairness and justice required in selective service proceedings by statute and regulations in that:

   a. he was subjected to racial discrimination;

   b. his selective service file contained "no basis in fact" for the denial to him of a ministerial exemption;

c. he was wrongfully denied conscientious objector status due to: mistaken advice from the Department of Justice to the Appeal Board for the Western District of Kentucky (the "Kentucky Appeal Board"); the failure of the Texas Appeal Board to refer his case for advice to the Department of Justice; and the denial to him and the Kentucky Appeal Board of copies of the Hearing Officer's report to the Department of Justice.

3. Whether the inclusion in the selective service file of reams of letters and newspaper clippings of a prejudicial nature and the pre-final classification statements of the Chairman of the House Armed Services Committee and the National Director of Selective Service deprived him of rights to due process and fair and just proceedings as guaranteed by the due process clause, statutes, and regulations.

4. Whether the refusal of the Government to produce and the district court to require production of documentary and other evidence required the dismissal of the indictment.

5. Whether the selective service proceedings, the denial of civil remedies and the proceedings in the district court deprived petitioner of a judicial trial and constituted a bill of attainder or pains and penalties in violation of article I, § 9, cl. 3 of the Constitution of the United States.

Constitutional and Statutory Provisions and Regulations Involved

1. The constitutional provisions involved are article I, § 9, cl. 3 and the first and fifth amendments and the equal protection and due process clauses of the fourteenth amend-

ment, the pertinent texts of which are set forth in the appendix hereto at pp. 55a-56a.

2. The statutory provisions involved are 50 U. S. C. App. §§ 451(c), 455(a), 456(g), 456(j), 460(b)(3) and 462(a) the pertinent texts of which are set forth in the appendix hereto at pp. 56a-62a.

3. The Regulations involved are 32 C. F. R. §§ 1600.735-1, 1600.735-2(a), 1604.1, 1604.6(b), 1604.11, 1604.12, 1604.21, 1604.22, 1604.24, 1604.25, 1604.52(a)-(c), 1604.54, 1604.55(a), 1622.1(b)-(d), 1622.14, 1622.43, 1622.60, 1624.1, 1625.2, 1626.23, 1626.24, 1626.25, 2627.1(a), 1627.3 the pertinent texts of which are set forth in the appendix hereto at pp. 63a-75a.

Statement of the Case

Indicted on May 8, 1967, petitioner was convicted of violation 50 U. S. C. App. § 462 and, on June 21, 1967, was sentenced to five years' imprisonment and a $10,000 fine (R. 277-78).

As noted by the Court of Appeals petitioner " . . . exhausted every administrative remedy provided by Selective Service" and " . . . fully pursued his rights in the United States courts in a vain attempt to stop his induction before his trial and conviction in the present case" [1] (7a).

Petitioner contended that he was entitled under the fifth and fourteenth amendments, 50 U. S. C. App. §§ 451(c),

[1] For a review of the administrative proceedings herein see the opinion of the Court of Appeals pp. 1a-7a, appendix hereto. For a review of related and allied judicial proceedings in which appellant sought to obtain civil redress see *id.*, pp. 7a-11a.

455(a), 32 C. F. R. §§1600.735, 1604.22, 1604.25, 1604.52(c), and 1622.1(d) to be classified and otherwise subjected to the obligations of military service only by a selective service system from which Negroes had not been systematically excluded.

Although the constitution, statutes, and regulations seem to agree regarding racial discrimination, no Negro served on petitioner's Kentucky Local or Appeal Boards, and of 641 local board members in that state only 0.2% were Negroes. No Negro served on petitioner's Texas Local or Appeal Boards and of 656 local board members 1.1% were Negroes. The 1960 Kentucky and Texas state populations contained Negro populations of 7.1% and 12.4% respectively. Negroes comprised 21% of the total population of the city of Louisville, Kentucky and 19.81% of the population of Harris County, Texas. See opinion of the Court of Appeals, pp. 13a-14a appendix hereto.

In the District Court petitioner sought witnesses and documents to prove systematic exclusion of Negroes from the selective service system, specific instances of racial or other prejudice against him, the selective service system's improper consideration of extraneous and prejudicial matter and the denial to him of procedural due process by the local and appeal boards and their members (R. 331-429).

The Court of Appeals found no error in the District Court's refusal to allow petitioner to procure the desired proof on the ground that "[w]hat the defense actually sought was to place the Selective Service System itself on trial by a broad, general, though vague and indefinite in-

vestigation into its activities and procedures."[2] Opinion of the Court of Appeals, p. 27a, appendix hereto.

Petitioner was denied conscientious objector status by the Louisville Local Board and the Appeal Board for the Western District of Kentucky, although his beliefs were admittedly based on the teachings of the Lost Found Nation of Islam; those beliefs were said by the Department of Justice to, " . . . 'rest on grounds which are primarily political and racial. These constitute objections to only certain types of war in certain circumstances, rather than a general scruple against participation in war in any form.' " *Id.*, p. 37a.[3]

Although the Department of Justice Hearing Officer recommended that conscientious objector status be granted and petitioner requested that the Appeal Board not act until the report, *the very report referred to in the Department's advice letter*, had been made available, that was never done. Efforts to obtain the report in the District Court were successfully opposed by the Government (R. 390-94, 419-27, 470-72).

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[2] *Cf.* "Nowhere in the record in this case or in appellant's brief do we find any specific charge or evidence of discrimination against appellant because he is a Negro. . . . [W]e have been unable to find any evidence which shows in the slightest particular that the treatment accorded Clay (Ali) by any board or member thereof was different from that given to any other registrant." Opinion of the Court of Appeals, p. 23a, appendix hereto.

[3] The Battle of Armageddon and Theocratic War seem once again relevant. Cf. *Taffs* v. *United States*, 208 F. 2d 329 (8th Cir. 1953) *cert. denied*, 347 U. S. 928; *Sicurella* v. *United States*, 348 U. S. 385, 390-92 (1955). The beliefs of the Lost Found Nation of Islam and Jehovah's Witnesses seem parallel on these matters and the Department's recommendation was clearly in error.

Petitioner was denied a ministerial exemption (apparently because his income was derived from and a portion of his time—less than 10% according to the record—was devoted to professional boxing (Opinion, 33a-34a appendix)).

It is clear from the record that petitioner, who spent more than 90% of his time at his religious calling and who was "ordained" in keeping with the tradition, and by the leader of his sect, was, objectively, a minister as statutorily defined. There is absolutely no evidence to the contrary in the record.

His local board viewed hundreds of letters and newspaper articles which must have made the board members feel that they, themselves, were on trial. These letters and articles ranged from racial attacks to religious slurs to a questioning of the honesty of the board members.

ARGUMENT

1. *A resume of the opinion of the Court of Appeals.* The court did " . . . not justify the failure to include substantial numbers of Negroes on [selective service] boards." Appendix, p. 17a. "The Selective Service System must not only be fair, it must likewise have the appearance of fairness," the court said. *Id.* "Negro draftees should be selected for military service by a system which gives Negro citizens a full participation in the selection process." *Id.*

Acknowledging this the court then proceeded to sustain the conviction of a well-known Negro citizen sentenced to five years in prison and fined $10,000 for refusing to step forward pursuant to an induction order issued from an ad-

mittedly lily-white selective service system. While doing this the court compared the non-"representative" boards with malapportioned legislatures, *id.* at 19a; rejected the argument " . . . that composition of draft boards is similar to that of grand and petit juries," *id.*; said that " . . . nothing in the Constitution or the . . . Act requires racially proportionate selective service boards," *id.*;[4] held that the one-Negro three-member Presidential Appeal Board's review of the action of local and other boards cured all racial or other errors, *id.* at 21-23;[5] found no evidence of specific

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[4] Petitioner had merely contended that Negroes should not have been systematically excluded from these boards because of race. A similar contention has been made in other cases presently pending in the Fifth Circuit. These cases are: *Sellers* v. *United States*, No. 26,108; *Sellers* v. *McNamara*, No. 24,654; *Battiste* v. *United States*, No. 25,675; *Kemp* v. *United States*, No. 25,704; *Simmons* v. *United States*, No. 25,371; and *Nelloms* v. *United States*, No. 25,154. Each of these cases arose in the Northern District of Georgia. Additionally, *Du Vernay* v. *United States*, No. 24,132 (Feb. 7, 1968) *rehearing denied* May 14, 1968, *petition for cert. filed*, June, 1968, involved similar questions but was decided by the Court of Appeals on non-exhaustion grounds. In *Smith* v. *Leach*, No. 11,690 (three-judge court N. D. Ga.) a Negro registrant brought suit to oust the membership of Georgia's selective service boards attempting to utilize the remedy apparently suggested in *Du Vernay*, slip opinion at 10, n. 6. Smith having been inducted the District Court considered his suit a petition for writ of habeas corpus and, while the case was being held under advisement the Army advised the court that it intended to discharge the plaintiff, arguably mooting the case. *United States* v. *Brooks*, No. 18,679, involving the same issue, is pending in the Sixth Circuit. Counsel is informed that the issue is pending in courts in the Second and Ninth Circuits.

[5] *Cf.* the effect of the appointment of a Negro to membership on this Court. The right of Negroes to have fairly selected jurors to find facts in lower federal and state courts was certainly unaffected thereby. Local boards find facts and Appeals Boards review them from the records made locally. If the Presidential Appeal Board analyzes facts, as it is clearly the duty of this court "to analyze the facts in order that the appropriate enforcement of the federal right may be assured.". *Norris* v. *Alabama*, 294 U. S. 587, 590

discrimination, *id.* at 23;[6] and found nothing wrong with the denial to appellant of the right to procure such evidence, *id.* at 24-28.[7]

2. *This case should be viewed in the context of our history—a history of racial segregation in the armed forces. The lily-white selective service system is but an unconstitutional and statutorily prohibited remnant of our racially discriminatory past.*

(1935). Although the conclusions of a state's highest court "are entitled to great respect . . . it becomes our [the Supreme Court's] solemn duty to make independent inquiry and determination of the disputed facts. . . ." *Pierre* v. *Louisiana*, 306 U. S. 354, 358 (1939). See also *Whitus* v. *Georgia*, 385 U. S. 545 (1967).

[6] See appendix at 48a, n. 23, dismissing the allegations of petitioner relating to prejudice against him. His lily-white boards in fact were placed on trial by letter writers many of whom referred to appellant and the board members using racial and religious epithets. The effect of these letters must have been far greater on their recipients than on judges, lawyers and other non-involved, non-recipient, readers not under attack. Of course, there were no doubt other pressures on the boards beyond the letters and the statements of newspaper columnists, General Hershey and Congressman Rivers.

[7] The Court of Appeal's approach to discovery under the liberalized F. R. Cr. P. 16(b) is at odds with this Court's pronouncement of its view of the proper approach under the new rule. *Compare* the opinion below: "The measure of discovery permitted by the Rules of Criminal Procedure is not intended to be as broad as in a civil case. . . . the rules . . . are far more restrictive governing criminal discovery." Appendix at 26a-27a; *with* ". . . the growing realization that disclosure, rather than suppression, of relevant materials ordinarily promotes the proper administration of criminal justice. . . . favoring disclosure in criminal cases analogous to the civil practice." *Dennis* v. *United States*, 384 U. S. 855, 870-71 (1966). Certiorari is appropriate to squarely consider Rule 16(b)'s "broadening of criminal discovery." *Id.* at n. 17. "The amendment is so sweeping that cases decided under the rule as it stood prior to July 1, 1966, are no longer authoritative." 4 BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 2031 (Supp. 1967).

At the beginning of World War II our completely segregated armed forces construed the Selective Service and Training Act of 1940, which forbade racial discrimination, to require merely "separate but equal" treatment. *Employment,* Report of the United States Commission on Civil Rights ("1961 Report") 45. " . . . [A]lmost total segregation continued in the Armed Forces throughout the war." *Id.* at 46.

On July 26, 1948, President Truman " . . . issued Executive Order 9981 to promote 'the highest standards of democracy' in the Armed Forces . . . [and provide] for equality of treatment and opportunity . . . without regard to race . . . . This policy shall be put into effect as rapidly as possible." *Id.* at 46-47. Integration without racial quotas was recommended in 1950. *Id.* at 47.

But President Truman's order would not apply to some military appendages. For example, " . . . where a segregated institution participates, [in R. O. T. C.] the student personnel are all of one race." *Id.* at 49. And, a Department of Defense spokesman has said "[w]here [segregation or discrimination] does occur in the National Guard, it is because of state law, while the National Guard is under the state's 'jurisdiction,'" *Id.* Despite this, the Commission on Civil Rights long before the riots in Watts recognized that an integrated National Guard, in times of racial tension " . . . would be reassuring to Negro citizens . . . observ[ing] that members of their race were on duty." 1961 Report at 51-52.[8] Regarding the reserves, the Commission on Civil Rights noted " . . . Negro participation is lower than in the regular Army." *Id.* at 52-53.

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[8] See also GREENBERG, RACE RELATIONS AND AMERICAN LAW (1959) 358: "But many National Guard units still segregate or

Initial action to integrate the armed forces followed the issuance of *To Secure These Rights,* The Report of the President's Commission on Civil Rights (1947) where " . . . the record show[ed] that the members of several minorities, fighting and dying for the survival of the nation in which they met bitter prejudice, found that there was discrimination against them even as they fell in battle." *Id.* at 41. At the time of that report Negroes could enlist in the stewards branch of the Marine Corps only and the Army limited enlistments to a ceiling of ten percent of total strength. *Id.* In the Navy there were two Negro officers, in the Coast Guard one, in the Marine Corps none. *Id.* at 42. In the seventy-five years preceding that report West Point had admitted 37 Negro students, Annapolis six, and the Coast Guard Academy none. *Id.* at 43.[8] Regarding the National Guard most states had no Negro units and those which did (except three) required segregation by regulation. Of the states studied only two permitted racial integration. *Id.* See also Greenberg, *supra,* 362-64. In 1959, Greenberg noted:

> Does the government deny liberty without due process of law or equal protection of the laws when it segregates or discriminates against its soldiers? Or are the

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even refuse to admit Negroes. . . ." See also the REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (1968) which noted at page 165: "In studying the relative performance of Army and National Guard forces in the Detroit disorder, we concluded that the higher percentage of Negroes in the Army forces contributed substantially to their better performance. As a result, last August, we recommended an increase in the percentage of Negroes in the National Guard." See also the topic, "Negro personnel in Guard units." *Id.* at 276.

[8] ". . . [A]s recently as 1940 there were only five Negro officers on active duty in the armed forces. . . ." GREENBERG, *supra,* at 356.

> armed forces immune from this constitutional requirement? During the Second World War and thereafter at least two suits were filed charging that discrimination in the armed forces was illegal, but they did not come to decision [footnote omitted]. As there is no real possibility that segregation will be reintroduced, there almost surely will never be a court decision on this issue with regard to the federal military. *Id.* at 357-58.

Draft boards presently have no known racial quotas established by or for them. *Id.* But this was not the case during World War II. In *United States ex rel. Lynn* v. *Downer,* 140 F. 2d 397 (2d Cir.), *cert. denied* 322 U. S. 756 (1944), *rehearing denied* 323 U. S. 817 (1945), the then existing selective service policy of racial quotas and segregated callups was attacked unsuccessfully. The two majority members of a Second Circuit panel then relied, at least in part, on *Plessy* v. *Ferguson,* 163 U. S. 537 (1896), 140 F. 2d at 401. In petition for certiorari, counsel for the registrant pointed out that:

> It should be noted that in the last war, the Selective Draft Act of 1917 (50 U. S. C. A. App. Sec. 201) did not provide against discrimination. The purpose of that clause in the Act of 1940 was clearly to prevent officials who were administering the Act from making any differentiation based on race or color. Brief in Support of Petition for Certiorari at 11, *United States ex rel. Lynn* v. *Downer, supra.*
>
> *This case raises the question of discrimination in selection only.* Petitioner objects to selection by civilian boards under a separate Negro quota in the draft call. *Id.* at 19 (emphasis in original).

Of course, such a ruling post-1954 would be absolutely inconceivable. *Cf. Whitus* v. *Georgia,* 385 U. S. 545 (1967). The result sought by Judge Clark in his dissent in *Downer* must be today's law. And of paramount importance it should be noted that the Supreme Court's denial of certiorari in *Downer* was based " . . . *on the ground that the case is moot, it appearing that petitioner no longer is in respondent's custody* . . . ." 322 U. S. 756 (emphasis added).[10]

Every important fact in appellant's classification and induction process was presented to lily white selective service boards which disbelieved, ignored, or rejected each of petitioner's contentions, much as the all-white juries of the Deep South have done with Negro criminal defendants.[11]

---

[10] Indeed, *cf.* the denial of certiorari in *Downer,* with the words of *Estep* v. *United States,* 327 U. S. 114, 121 (1946) "If a local board . . . classified a registrant . . . because he was . . . a Negro, it would act in the defiance of the law . . . . In all such cases its action would be lawless and beyond its jurisdiction." Petitioner reiterates that he was denied discovery and compulsory process as he sought to prove this fact.

[11] *Cf. Cassell* v. *Texas,* 339 U. S. 282, 289 (1950), where the fact that prospective jurors were selected on the basis of personal acquaintance was held to not correct the evil. Concerning the exercise of discretion by the local groups which suggest appointment to local and appeal boards, see *United States* v. *Mississippi,* 380 U. S. 128 (1965); and *Louisiana* v. *United States,* 380 U. S. 145 (1965). Discretion is at the heart of these state voting discrimination cases.

Appointments are made to local boards by the President "from recommendations made by the respective governors or comparable executive officials." 50 U. S. C. App. § 460(b)(3); 32 C. F. R. § 1604.52. As a practical matter, however, nomination by a governor is tantamount to appointment. See the statement of Hon. William F. Ryan (D., N. Y.), *Hearings before the Committee on Armed Services,* 89th Cong., 2d Sess. at 9919.

In Texas the names of nominees for local board membership are submitted to the Governor by a local committee (R. 159). *Cf.* the local jury commission system utilized by many Southern state courts for the selection of names of those to be included on jury rolls and lists.

There was no basis in fact for denial of either conscientious objector or ministerial status; the entire proceeding amounting to a bill of attainder or pains and penalties and the prejudicial matter contained in his file makes it doubly certain that petitioner was discriminated against. He was denied due process, procedurally.[12] And there was absolutely no evidence, "no basis in fact," upon which a conviction could be based. *Cf. Fields* v. *Fairfield,* 375 U. S. 248 (1963); *Garner* v. *Louisiana,* 368 U. S. 157 (1961); and *Thompson* v. *City of Louisville,* 362 U. S. 199 (1960).

The government by utilizing every technique at hand deprived appellant of access to material essential for his defense.

In *Dennis* v. *United States,* 384 U. S. 855 (1966) where criminal defendants were not allowed to view grand jury minutes for want of a particularized need the Supreme Court reversed saying:

> "Nor is it realistic to assume that the trial court's judgment as to the utility of material for impeachment or other legitimate purposes, however conscientiously made, would exhaust the possibilities. In our adversary system, it is enough for judges to judge. The determination of what may be useful to the defense can properly and effectively be made only by an advocate [footnote omitted]. The trial judge's function in this respect is limited to deciding whether a

[12] Petitioner sought to prove the denial of procedural due process and equal protection unsuccessfully attempting to procure the minutes of meetings, the records of conversations between members of the Presidential Appeal Board and its executive director, other related intra-selective service system communications, the files of those granted ministerial exemption by the Louisville Local Board in 1966 and an unpublished regulation of the Department relating to conscientious objectors (R. 331-45, 381-82, 390-94).

case has been made for production, and to supervise the process . . . ." *Id.* at 874-75.

And,

> ". . . in the criminal field . . . it has been held that the Government can invoke its evidentiary privileges only at the price of letting the defendant go free [footnote omitted]. The rationale of the criminal cases is that, since the Government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense." *United States* v. *Reynolds,* 345 U. S. 1, 12 (1953).

See also *Rosenberg* v. *United States,* 360 U. S. 367 (1959); *United States* v. *Coplon,* 185 F. 2d 629, 636-40 (2d Cir. 1950) (L. Hand, J.), *cert. denied* 342 U. S. 920 (1952); *United States* v. *Beekman,* 155 F. 2d 580 (2d Cir. 1946); *United States* v. *Andolschek,* 142 F. 2d 503 (2d Cir. 1944); *United States* v. *Cotter,* 60 F. 2d 689, 692 (2d Cir. 1932); *Cf. Simmons* v. *United States,* 348 U. S. 397, 402-403 (1955) and *Gonzales* v. *United States,* 348 U. S. 407 (1955).

The decisions of the Second Circuit and of this Court demonstrate clearly that the Government cannot be allowed to enmesh a defendant in a procedural maze and then deny him the right to discover evidence, impeach witnesses and allow his counsel the factual tools with which to fashion his defense. This is doubly true when these defenses themselves by their very nature question the application of the power of the Government in a procedure which Congress and the Constitution require to be "fair and just."

Perhaps even more importantly the Department of Justice has effectively established a religion, discriminated between religions and religious beliefs.

Surely there can be no doubt regarding the religious nature of the beliefs of followers of the Lost Found Nation of Islam. For the Muslim movement has been recognized as a religious movement by the courts. See, *e.g.*, *Walker* v. *Blackwell,* 360 F. 2d 66, 68 (5th Cir. 1966); *Pierce* v. *LaVallee,* 293 F. 2d 233 (2d Cir. 1961); *United States* v. *Mohammed,* 288 F. 2d 236 (7th Cir. 1961), *cert. denied,* 368 U. S. 820 (1961); *Brown* v. *McGinnis,* 10 N. Y. 2d 531, 180 N. E. 2d 791 (1962).

Despite this recognition of the Muslim religion by the courts—surely the First Amendment requires no less than that—despite the sincerity of petitioner's beliefs as attested to by the Department's Hearing Officer, despite his recommendation that conscientious objector status be granted, the Department, in effect, ruled that beliefs of the Muslims were primarily political and racial, rather than religious. As the Department said:

> It is therefore our conclusion that registrant's claimed objections to participation in war *insofar as they are based upon the teachings of the Nation of Islam,* rest on grounds which primarily are political and racial. These constitute objections to only certain types of war in certain circumstances, rather than a general scruple against participation in war in any form. However, only a general scruple against participation in war in any form can support an exemption as a conscientious objector under the Act. *United States* v.

Kauten, 133 F. 2d 703 (2d Cir. 1943). (Government Exh. No. 1 at 220, offered at R. 48, admitted at R. 139.)

> With due regard for the recommendation of the Hearing Officer, the Department of Justice finds that the registrant's conscientious objector claim is not sustained and recommends to your Board that he not be classified in Class 1-O or in Class 1-A-O. *Id.* at 225 (emphasis added).

Terming religious views "political and racial" is ancient practice not unknown in even the relatively modern South. For the presidential candidacy of Alfred E. Smith " . . . was final proof to millions of Protestants in the South, as in the rest of America, for that matter, that the Pope was plotting to seize the White House." Cash, *The Mind of the South,* 343 (1941). In that campaign Alabama's then senior Senator J. Thomas ("Cotton Tom") Helfin was said, perhaps apocryphally, to have charged from the stump: "The Pope is off the coast of Mobile in a submarine waiting to steam in and take over!" The administration of John F. Kennedy laid some Protestant fears to rest, but, in the Deep South's 1960 campaign against him the historic cry was almost paraphrased into "Scotch, Romanism, and Rebellion."

Indeed, as recently as 1948 South Carolina's Democratic Party adopted, then watered down, a primary voting prerequisite of belief in and support for " . . . the social, *religious* and educational separation of the races." Key, *Southern Politics,* 629-30 (1949) (emphasis added).

Nor are the Muslims the sole believers in racial-religious doctrine, if, indeed, that be the case. For "'[t]heories of

race were as much a part of Southern Baptist thinking as the Virgin Birth or the Second Coming,' one student declares" [footnote omitted]. Bailey, *Southern White Protestantism in the Twentieth Century* 6 (1964). And, of course, since prior to the time of Christ, anti-Semitism has persisted. Jews in and out of the South are constantly accused of being members of one political conspiracy or another, the currently popular one being a mystic alliance with Communists and integrationists with an occasional Catholic thrown in. As late as 1960 the Remember Mary Phagan Committee was organized in Atlanta to memorialize the woman around whose death the scaffolding of the *Leo Frank* case was constructed. A circular issued by the Committee claimed ". . . . the Jews are behind the Supreme Court's decision to destroy the white race." Golden, *A Little Girl Is Dead* 312 (1965).

The categorization by the Department of the nature of the beliefs of members of the Lost Found Nation of Islam is forbidden by the first and fifth amendments, the Act, and the regulations. For to allow men of a predominant race, religion and political persuasion to sit in judgment on the nature of another man's dissenting beliefs is to fly in the face of *United States* v. *Seeger,* 380 U. S. 163, 184 (1965), which said:

> The validity of what he believes cannot be questioned. Some theologians, and indeed some examiners, might be tempted to question the existence of the registrant's "Supreme Being" or the truth of his concepts. But these are inquiries foreclosed to Government. As Mr. Justice Douglas stated in *United States* v. *Ballard,* 322 U. S. 78, 86 (1944): "Men may believe what they

cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others."

That the religious dissenter as well as the political dissenter is entitled to the full protection of the Constitution and the laws and regulations made under and pursuant to it is clear. For "[t]hose who begin *coercive elimination* of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard." *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624, 641 (1943).

In the Revolution 5000 Negroes including Crispus Attucks, " . . . perhaps the first American to die for freedom . . . " fought to make a United States. *Report of the National Advisory Commission on Civil Disorders,* 96 (1968). They fought, 186,000 strong, in segregated units of the Union Army for the freedom Mr. Lincoln offered. *Id.* at 98. In World War I more than 2,000,000 Negroes registered under the Selective Service Act. Approximately 360,000 entered the service in that war to make the world safe for democracy. *Id.* at 102. But, still in World War II "[t]he United States . . . fought racism in Europe with a segregated fighting force." *Id.* at 104.

Today it is the right of appellant to be treated on an equal basis with all other registrants. Whether he and others like him are to be so treated is an important question of federal law which has not been, but should be, settled by this court.[13] He seeks to avoid military service

[13] The Court of Appeals seems to have decided this question in a way in conflict with applicable decisions of this court, or has

on the same basis as white men of like or similar status or persuasion. For precisely this reason, this equal right, thousands of Negroes in America's armed forces have fought, been wounded, and died.

Despite changes made within the armed services themselves, the selective service system remains an anachronistic part of our discriminatory past. Indeed, as late as 1947 the government advertised for contract bids for racially segregated feeding of inductees. Greenberg, *supra,* at 359. And, of course, the exclusion of Negroes from the selective service system has been noted and condemned by both observers and participants including the President[14] and the National Advisory Commission on Selective Service. As the Court of Appeals in this case stated:

> The Selective Service System must not only be fair, it must likewise have the appearance of fairness. Negro draftees should be selected for military service by a system which gives Negro citizens a full participation in the selection process. (Opinion, 17a, appendix.)

Having stated this, the Court then seems to have ignored its own words. The proceedings do not look fair; appellant contends they were not fair. He was a "Negro draftee." He was entitled to "be selected [or rejected] by a system

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sanctioned a departure therefrom which calls for an exercise of this court's power of supervision.

[14] See, *e.g., The President's Message to the Congress, March 6, 1967,* 3 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 386 (March 13, 1967) (Defendant's Exhibit 2, admitted at R. 163).

which gives Negro citizens a full participation . . . " even if he is a follower of the Muslim faith and the Heavyweight Champion of the World.

Respectfully submitted,

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Opinion of the Fifth Circuit Court of Appeals

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 24991

CASSIUS MARSELLUS CLAY, JR.,
Appellant,

versus

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Southern District of Texas.

(May 6, 1968.)

Before COLEMAN, AINSWORTH and DYER, Circuit Judges.

AINSWORTH, Circuit Judge: "It may not be doubted that the very conception of a just government and its duty to the citizen includes the reciprocal obligation of the citizen to render military service in case of need and the right to compel it." Chief Justice Edward Douglass White, *Selective Draft Law Cases*, 245 U. S. 366, 378, 38 S. Ct. 159, 161 (1918).

Cassius Marsellus Clay, Jr., also known as Muhammad Ali, heavyweight professional boxing champion

of the world, was convicted after trial by jury on an indictment charging violation of 50 U.S.C. App. § 462, for knowingly and wilfully refusing to report for and submit to induction into the armed forces of the United States. Clay's draft case has been through practically every phase of selective service procedure, beginning with the date he registered on April 18, 1960, until he was ordered to report but declined to submit to induction on April 28, 1967, and was thereafter convicted by jury trial held on June 19, 20, 1967. On four different occasions he was classified 1-A (Available for military service) by his local board, twice by two different appeal boards (in Kentucky and Texas) and once by the National Selective Service Appeal Board (the Presidential Appeal Board). In every instance the vote of the boards was unanimous.

There has been no administrative process which Clay (Ali) has not sought within the Selective Service System, its local and appeal boards, the Presidential Appeal Board and finally the federal courts, in an unsuccessful attempt to evade and escape from military service of his country. Being entirely satisfied that he has been fairly accorded due process of law, and without discrimination, we affirm his conviction.

The pertinent but lengthy chronology of his case follows:

April 18, 1960—Clay (Ali) registered for selective service with Local Board No. 47, Louisville, Kentucky.

March 9, 1962—Registrant was classified 1-A by Local Board No. 47, Louisville, Kentucky.

March 26, 1964—Registrant was classified 1-Y as a result of a physical examination, as being not acceptable for induction in the armed forces and not qualified under current standards.

February 17, 1966—Registrant was reclassified 1-A by Local Board No. 47, Louisville, Kentucky, after having been considered by the Examining Station in accordance with current regulations and found fully acceptable for induction.

February 18, 1966—1-A classification notice was mailed to registrant. Clay (Ali) was furnished Special Form for Conscientious Objector (SSS Form 150).

February 28, 1966—Special Form for Conscientious Objector was filed by registrant with the local board. This was the first time such a claim had been made. Registrant requested a personal appearance before the local board in reference to the change of his classification from 1-Y to 1-A.

March 17, 1966—The local board granted a personal appearance before it by registrant and again classified him 1-A.

March 28, 1966—Registrant appealed the 1-A classification to the Kentucky Appeal Board.

May 6, 1966—The Kentucky Appeal Board reviewed the file de novo and tentatively determined that the registrant was not entitled to the 1-O, conscientious objector or lower, classification. The complete file was referred to the Department of Justice for an advisory recommendation as provided by Selective Service Regulations (32 C.F.R. § 1626.25), and an investigation by the Federal Bureau of Investigation was requested by the Department.

August 23, 1966—Registrant filed a letter request with Local Board No. 47, Louisville, Kentucky, for reclassification to IV-D as a minister of the Lost Found Nation of Islam (Black Muslims).

August 23, 1966—The FBI investigation having been made, a special hearing was held in Louisville, Kentucky, to consider registrant's conscientious objector claim. The Hearing Officer reported his belief that the registrant was sincere in his conscientious objector claim.

November 25, 1966—The Department of Justice, Office of Legal Counsel, Conscientious Objector Section, recommended to the Kentucky Appeal Board that the request of the registrant for conscientious objector status be denied. Registrant was mailed a copy of the recommendation on November 29, 1966.

January 10, 1967—The Kentucky Appeal Board denied the requested conscientious objector claim and notified the registrant that he was classified 1-A.

January 12, 1967—Local Board No. 47, Louisville, Kentucky, reviewed the registrant's complete file but declined to reopen his classification. The board agreed unanimously that registrant was not entitled to the IV-D ministerial exemption.

January 19, 1967—Pursuant to the written request of General Lewis B. Hershey, the National Director of Selective Service, Local Board No. 47, Louisville, Kentucky, reopened and considered anew the classification, including the claim for ministerial classification, and after re-examining the registrant's file again classified him 1-A, and notice of classification was mailed to registrant.

January 26, 1967—Registrant appealed the 1-A classification and requested that the Appeal Board for the Southern District of Texas (the place of his current domicile at Houston, Texas) hear the appeal.

February 15, 1967—The Appeal Board for the Southern District of Texas classified registrant 1-A and returned his file to Kentucky on February 20, 1967, after finding that no new information had been submitted relating to his conscientious objector claim, and having considered and rejected his claim for ministerial exemption.

February 24, 1967—The National Director of Selective Service, General Lewis B. Hershey, appealed

the registrant's classification to the National Selective Service Appeal Board (the Presidential Appeal Board). (See 32 C.F.R. § 1627.1 for the authority of the National Director to do so.) Registrant could not file such an appeal because the regulations (32 C.F.R. § 1727.3) require that one or more members of the appeal board dissent from the classification before a registrant has such a right to file the appeal himself.

March 6, 1967—The Presidential Appeal Board unanimously voted to classify the registrant 1-A, and a copy of "Minutes of Action Upon Appeal to the President" was forwarded to the local board on March 14, 1967.

March 14, 1967—Local Board No. 47, Louisville, Kentucky, ordered the registrant to report for induction on April 11, 1967, at Louisville, Kentucky.

March 24, 1967—Registrant requested a transfer of induction to Houston, Texas, which was granted by Local Board No. 61 at Houston.

March 29, 1967—Local Board No. 61, Houston, Texas, ordered registrant to report to it on April 28, 1967, for delivery to the induction station.

April 28, 1967—Registrant reported for but declined to submit to induction on the grounds of his religious beliefs as a minister of the Islam Religion.

May 8, 1967—Registrant was indicted for violation of 50 U.S.C. App. § 462.

June 19, 20, 1967—Registrant was tried and convicted by a jury of the selective service violation for refusing to submit to induction, and sentenced to five years' imprisonment and a fine of $10,000.[1] This is his appeal from the conviction and sentence.

Clay (Ali) has no prior criminal record and no previous charges or convictions for crime, other than minor traffic violations.

The registrant has, therefore, exhausted every administrative remedy provided by Selective Service. He has also fully pursued his rights in the United States courts in a vain attempt to stop his induction before his trial and conviction in the present case.

In Kentucky, registrant, who is a Negro, filed suit in the United States District Court for the Western District of Kentucky to prevent his induction into the armed forces. In his suit he sought a declaration that the Universal Military Training and Service Act is unconstitutional on its face and as applied because of "systematic exclusion" of Negroes from membership on draft boards; also, for an injunction to restrain all draft boards in Kentucky from performing their functions until Negroes were appointed to boards in proportion to their ratio to the population. He sought to enjoin further classification and induc-

[1] The District Judge said in this regard:
"Well, I am going to impose the maximum penalty because under the rules at the end of an appeal if it is reversed, why, of course it is nil. If it is affirmed it is then subject to motion to reduce, and I find that we get into problems when clemency is given at the time of sentencing and then following an affirmance there is another petition for clemency." (R. 277)

tion of Negroes until this had been accomplished. The District Court denied relief, holding that no evidence had been submitted and no contention made that Clay (Ali) had been deprived of any right of appeal or other administrative process of Selective Service; that there was no evidence that he had personally been singled out and subjected to punitive action or other discriminatory treatment by the System. The District Court said that the issues were not appropriate for judicial review until the registrant either submitted to induction or refused to submit to induction, at which time the issues could be raised either by habeas corpus or in defense to a criminal prosecution. The District Court also held that except in rare circumstances, not present here, it was not the function of the judiciary to enjoin the operation or enforcement of the Universal Military Training and Service Act. A stay of injunction pending appeal was refused. *Muhammad Ali v. Breathitt*, D. C., W. D. Ky., 1967, 268 F. Supp. 63. Registrant petitioned the Sixth Circuit for leave to appeal and for temporary restraining order pending appeal, which was denied, the Court taking cognizance of the District Judge's denial of a certification that immediate appeal was warranted and the denial of an order staying proceedings (Unpublished opinion, 6 Cir., Docket No. 17787, March 28, 1967.) The Sixth Circuit, on April 17, 1967, denied registrant's application for an order staying orders of the District Court and for an injunction pending appeal. (Unpublished opinion, 6 Cir., Docket No. 17834.) On the same day, the Supreme Court denied registrant's application for stay of the

order of the United States District Court for the Western District of Kentucky, for injunction pending appeal and denied leave to file a petition for mandamus. *Muhammad Ali v. Gordon,* 386 U. S. 1002, 87 S. Ct. 1365 (1967). Rehearing was denied by the Supreme Court on April 24, 1967. 386 U. S. 1027, 87 S. Ct. 1388. On the same day, the Supreme Court also denied petition for writ of certiorari to the Sixth Circuit. *Muhammad Ali v. Gordon,* 386 U. S. 1018, 87 S. Ct. 1376.

In Texas the registrant filed a similar suit in the United States District Court, Southern District of Texas, raising substantially the same legal contentions as those in the Kentucky suit. The District Court (Judge Hannay) denied relief and ruled that the selectee's remedy could only arise after the final step toward military induction and should he refuse this step, his remedy would lie in whatever defense he claimed in the criminal prosecution. The District Judge said that a second remedy available was that of habeas corpus in the event the selectee should take the final step toward military induction while claiming that his induction was illegal, unconstitutional and void. *Muhammad Ali v. Connally,* D. C., S. D. Tex., April 28, 1967, 266 F. Supp. 345.

The registrant appealed from the District Court decision. He also filed application to stay and for interim injunction pending appeal, which was denied by the District Judge. He then petitioned Judge John R. Brown of the Fifth Circuit (now Chief Judge) for in-

junction pending appeal, which was denied,[2] and the matter was then referred to a panel of this Court (Judges Gewin, Coleman and Simpson), which also denied the motion for stay and injunction pending appeal. (Unpublished order, 5 Cir., Docket No. 24714, May 11, 1967.)

After refusing induction on April 28, 1967, appellant filed another suit in the United States District Court, Southern District of Texas, on April 29, 1967, for similar relief, which was denied on May 1, 1967 by Judge Seals for substantially the same reasons assigned by Judge Hannay in the prior case, the District Judge being of the opinion that the subsequent refusal of induction did not suffice to create a remedy for injunctive relief. At the same time an application for a stay and for an interim injunction to the District Court pending appeal was also denied. A panel of the Fifth Circuit (Judges Gewin, Coleman and Simpson), on May 11, 1967, thereafter denied a motion for stay or

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[2] Judge Brown in detailed reasons for his refusal (unpublished opinion) said in part:

> "I conclude that on traditional principles the equities—which includes the public interest—argue against such relief. I would not intimate what the intrinsic merits are—but I am convinced that the chances of success on appeal are so remote that I ought not to grant it.
>
> . . . .
>
> "Balancing these factors I do not think that the courts should intervene to test, on the application of every registrant, the statutory validity of the process. The law will not finally ever compel the unlawful conscription of a citizen or permit criminal punishment for failure to submit to unlawful orders. That inconvenience, hardship or risk may be suffered if and until Congress prescribes other remedies—one of the perils of civilization and citizenship in a nation which calls on its citizens for the protection of its national and international interests."

injunction pending appeal of Judge Seals' decision. (Unpublished order, 5 Cir., Docket No. 24723.)

Appellant, having been indicted on May 8, 1967 for the selective service violation, then petitioned the Fifth Circuit for a writ of prohibition to restrain the impending trial, which petition was denied by a panel of this Court (Judges Tuttle, Washington and Simpson) on May 15, 1967. (See unpublished order, 5 Cir., in Docket No. 24750.)[3]

We summarize the principal questions for decision as follows:

1) Was the selective service induction order to appellant invalid because of alleged systematic exclusion of Negroes from draft boards?

2) Did the District Court err in refusing to grant appellant's request for the production of certain documentary and other evidence?

3) Was there a basis in fact for the denial to appellant of a ministerial exemption?

4) Was there a basis in fact for the denial to appellant of conscientious objector status?

[3] The appeal to the Fifth Circuit from Judge Hannay's ruling (Docket No. 24714) was dismissed for want of prosecution on July 28, 1967; and the appeal from the ruling of Judge Seals (Docket No. 24723) was dismissed for want of prosecution on September 5, 1967.

5) Did the proceedings as a whole, selective service and judicial, constitute a prohibited bill of attainder?

I.

THE ALLEGED SYSTEMATIC EXCLUSION OF NEGROES FROM SELECTIVE SERVICE BOARDS

The Selective Service System is based on the constitutional provision which grants to Congress the power "To raise and support Armies . . . . " U. S. Const. art I, § 8(12). The Universal Military Training and Service Act provides (50 U.S.C. App. § 460(b)(3)) that the President is authorized to create civilian local boards and appeal boards. Each local board shall consist of three or more members to be appointed by the President from recommendations made by the respective governors of each of the states. No member of any local board shall be a member of the armed forces but each member shall be a citizen residing in the local board jurisdiction. Appeal boards shall also be composed of citizens who are not members of the armed forces and consist normally of five members appointed by the President upon recommendation of the governor. The appeal board shall be a composite board representative of the activities of its areas and shall include one member from labor, one member from industry, one physician, one lawyer and, where applicable, one member from agriculture. (32 C.F.R. § 1604.22.)

Thus the racial composition of the local and appeal boards about which appellant complains, because of

the absence of a proportion of Negroes in accordance with their ratio to the population, results from appointment by the President upon recommendation of the governor of each state. The appointments are therefore federal, not state.

There is also a National Selective Service Appeal Board (sometimes called the Presidential Appeal Board) composed of three members who are appointed by the President from citizens who are not members of the armed forces. This board acts for the President himself, being vested with the functions and duties of the President provided by the Act (50 U.S.C. App. § 460(b)(3)), which reads in pertinent part as follows:

> "The President, upon appeal or upon his own motion, shall have power to determine all claims or questions with respect to inclusion for, or exemption or deferment from training and service under this title, and the determination of the President shall be final."

This board shall be in all respects independent of the Director of Selective Service. (32 C.F.R. § 1604.6 (a), (b), (c).) It was stipulated in the present record that one of the three members of the Presidential Appeal Board was a Negro. However, there was no Negro member on any of the local or appeal boards which considered appellant's draft case.

According to the report of the National Advisory Commission on Selective Service (the Marshall Com-

mission), in Kentucky, only 0.2% of 641 local board members is Negro, though 7.1% of the total population is Negro. In Texas, only 1.1% of local board members is Negro, though 12.4% of the total population is Negro. In the City of Louisville, the total population (1964) is 389,044, of which the white population is 310,717 and the Negro population 78,245, or 21% of the total population.[4] The Jefferson County, Kentucky, total population (1960) number 610,947, of which there are 532,057 whites and 78,350 Negroes, or 12.8% of the total population. In Harris County, Texas, of a total population of 1,243,158, 19.81%, or 246,-351, is Negro.[5]

According to the Marshall Commission Report, the unequal percentage of Negroes on draft boards was not peculiar to Kentucky, Texas or the South, but the imbalance was nationwide. Only in the District of Columbia and in Delaware were there substantial percentages of Negroes on the boards. In twenty-three states, there were no Negroes on draft boards, the Report stated.[6]

Nevertheless the Marshall Commission said significantly in its report, "There is no evidence that the

[4] Appellant's brief asserts the Negro population of Louisville (1964) to be 78,327 and the percentage of Negroes to be 20.1%—a slight error. The difference is, of course, not significant. See Special Censuses, Series P-28, No. 1377, Louisville, Kentucky (United States Department of Commerce).

[5] Appellant in brief supplies other calculations from the record as follows: 9.60% of the total population of the Western District of Kentucky is Negro; 14.25% of the total population of the Southern District of Texas is Negro.

[6] For example, there were no Negroes on draft boards in such states as Indiana, Iowa, Kansas, Maine, Minnesota, New Jersey and Rhode Island.

variability of the Selective Service System leads to any systematic biases against poor people, or Negroes, insofar as the final proportion of men serving in the Armed Forces is a measure of this."

As a direct result of the Marshall Commission Report, the President in his message to the Congress on Selective Service dated March 6, 1967, instructed the Director of the Selective Service System to work with the governors "to assure that all local boards are truly representative of the communities they serve and to submit periodic reports on the progress in this area."

The Universal Military Training and Service Act in its congressional declaration of policy declares that the obligations and privileges of serving in the armed forces should be shared generally in accordance with a system of selection which is "fair and just" (50 U.S.C. App. § 451(c)). The Act further provides (50 U.S.C. App. § 455(a)) that "The selection of persons for training and service . . . shall be made in an impartial manner, under such rules and regulations as the President may prescribe, from the persons who are liable for such training and service and who at the time of selection are registered and classified, but not deferred or exempted: *Provided*, That in the selection of persons for training and service under this title . . . , and in the interpretation and execution of the provisions of this title . . . , there shall be no discrimination against any person on account of race or color: . . . ."

The Selective Service Regulations (32 C.F.R. § 1622.1(d)) provide, "In classifying a registrant there shall be no discrimination for or against him because of his race, creed, or color, or because of his membership or activity in any labor, political, religious, or other organization. Each such registrant shall receive equal justice."

Appellant argues that the quoted statistics evidence racial exclusion in the composition of draft boards, in violation of the Fifth Amendment. He cites *United States v. Jefferson County Board of Education*, 5 Cir., 1966, 372 F. 2d 836, 837, aff'd on rehearing, en banc, 380 F. 2d 385 (1967), cert. denied, sub nom. *Board of Education of the City of Bessemer v. United States*, 389 U. S. 840, 88 S. Ct. 77 (1967), where this Court said that it has frequently relied on percentages in jury exclusion cases and in other civil rights cases for evidence of deliberate discrimination against Negroes. He concludes that if systematic exclusion of Negroes is constitutionally barred in the composition of juries, their exclusion in the Selective Service System likewise infringes his rights and requires a holding that draft boards, such as those in Kentucky and Texas which considered appellant's case, have no jurisdiction over appellant or in fact over any Negro. Thus he argues that the local boards have acted beyond their jurisdiction and may not act as to that class of registrants (including appellant) against whom it is claimed the appointing process has discriminated. Appellant concedes that considerable progress in rectifying this disparity in the several states has been

made since the President's March 6, 1967, message to Congress on Selective Service, but contends that Negroes should not be selected in the future until the alleged systematic exclusion of members of that race from draft boards has ceased.

Appellant likens his classification and induction into the armed forces to a criminal prosecution because, as in a criminal prosecution, the Government restrains a registrant of his liberty and may even cause his death by sending him into combat.

No court has held, so far as we can determine, nor do we here, that a Negro registrant for selective service is entitled to be classified and inducted by a selective service board composed of a percentage of Negro members which the Negro population bears to the total population, or that a board lacks jurisdiction of a registrant unless so constituted. No question is raised that the boards which considered appellant's classification were not regularly and properly constituted under appointment by the President, recommended by the governor. We do not justify the failure to include substantial numbers of Negroes on such boards. The Selective Service System must not only be fair, it must likewise have the appearance of fairness. Negro draftees should be selected for military service by a system which gives Negro citizens a full participation in the selection process. The Marshall Commission affirmed the necessity of greater participation by Negroes who are underrepresented as a class on local draft boards.

The Commission said that the Negro's position in the military manpower situation is in many ways disproportionate, even though he does not serve in the armed forces out of proportion to his percentage to the population. The President in his March 6, 1967, message to Congress said in this regard: "The Nation's requirement that men must serve, however, imposes this obligation: that in this land of equals, men are selected as equals to serve. A just nation must have the fairest system that can be devised for making that selection." We concur with these remarks to the fullest. But nothing we have said justifies exemption from service in the armed forces for Negro registrants.

It is undeniable, as appellant contends, that conscription deprives an individual of his liberty and may even take his life. But we cannot properly compare the military draft to a criminal prosecution. There is no stigma attached to wearing the military uniform of the United States. To the contrary, it is a badge of the highest honor. Service under the flag of our country cannot properly be likened to imprisonment in a penitentiary. A proud nation with a long tradition of valor and bravery on the battlefield, with vivid memories in modern times of distant places where Americans have fought and died to preserve freedom, some with unusual names, such as Chateau-Thierry, Normandy, Iwo Jima and Khe Sanh, would never permit a comparison so odious. It is the same willingness of Americans to sacrifice their lives in the military service of the country which has made it

possible to establish the United States as a free nation, and which has successfully warded off the encroachments of its enemies. "The knowledge that military service must sometimes be borne by—and imposed on—free men so their freedom may be preserved is woven deeply into the fabric of the American experience." President Johnson, Message on Selective Service to the Congress, March 6, 1967.

The Government argues—and we agree—that a draft board system which does not have a sufficiently representative number of Negro members is comparable to a malapportioned legislature. The acts of such a legislature are not invalid and the laws which it passes are not null and void. The acts of a malapportioned legislature or local or county commission or board are acts of a de facto political authority and valid despite their failure to be apportioned in accordance with *Baker v. Carr*, 369 U. S. 186, 82 S. Ct. 691 (1962), and *Avery v. Midland County, Texas*, ... U. S. ...., 88 S. Ct. 1114 (1968).

Nor is appellant's argument meritorious that composition of draft boards is similar to that of grand and petit juries. The right to trial by jury has specific constitutional authority. However, nothing in the Constitution or the Universal Military Training and Service Act requires racially proportionate selective service boards. It is not difficult to understand the reasons which support the prior rulings of the Supreme Court and this Court in the jury selection cases where convictions have been set aside for

failure to have representative numbers of Negroes on jury venires. See *Whitus v. State of Georgia*, 385 U. S. 545, 87 S. Ct. 643 (1967); *Rabinowitz v. United States*, 5 Cir., 1966, 366 F. 2d 34; *Mobley v. United States*, 5 Cir., 1967, 379 F. 2d 768. The boards are administrative agencies with specific duties, many of them purely ministerial, which are provided for by the Act and Selective Service Regulations. A jury's verdict arrived at by secret deliberation has a finality which is not at all applicable to selective service classification and induction. As we shall see, draft board appeals are considered de novo and are not judicial proceedings.

The war powers of Congress to raise and support armies are constitutionally authorized and are of paramount public importance because they directly involve the protection and preservation of the nation itself. In this vital and sensitive area it behooves the judiciary to recognize the imperative necessity for the maintenance of the national integrity as upheld by the military forces of the United States. The Universal Military Training and Service Act provides that "every male citizen of the United States" between certain ages shall register and be subject to induction in the armed forces of the United States. Exemptions from service, such as for conscientious objectors or ministers of religion, are matters of legislative grace. *United States v. Mohammed*, 7 Cir., 1961, 288 F. 2d 236, 242; *Parrott v. United States*, 9 Cir., 1966, 370 F. 2d 388, 391. It has been long established that there is no constitutional right to exemp-

tion from military service by virtue of conscientious objection or religious calling. *Wood v. United States*, 5 Cir., 1967, 373 F. 2d 894, 900, reversed on other grounds, 389 U. S. 20, 88 S. Ct. 3 (1967); *George v. United States*, 9 Cir., 1952, 196 F. 2d 445, 449. These exemptions do not spring from the Constitution but from the Congress. *George v. United States*, *supra*. The Supreme Court said in *Jacobson v. Massachusetts*, 197 U. S. 11, 29, 25 S. Ct. 358, 362 (1905), that despite the liberty secured by the Fourteenth Amendment a person "may be compelled, by force if need be, against his will and without regard to his personal wishes or his pecuniary interests, or even his religious or political convictions, to take his place in the ranks of the army of his country, and risk the chance of being shot down in its defense."

It will be recalled that there were seven different occasions on which appellant was classified 1-A; four by his local board, twice by two different appeal boards in Kentucky and Texas, and once by the Presidential Appeal Board. The appeals in each instance were considered de novo.[7] "It is universally held that the Appeal Board considers matters of classification *de novo* and its classification is one of first instance, not a mere affirmance or reversal of the Lo-

[7] As to the appeal boards, the Regulations provide (32 C.F.R. § 1626.26):

"(a) The appeal board shall classify the registrant, giving consideration to the various classes in the same manner in which the local board gives consideration thereto when it classifies a registrant.

"(b) Such classification of the registrant shall be final, except where an appeal to the President is taken; . . . ."

"The state appeal boards make a de novo classification." Comment, *The Selective Service*, 76 Yale L. J. 160, 171 (1966).

cal Board, and that any . . . prejudice on the local level is cured by a fair consideration on the appeal." *DeRemer v. United States*, 8 Cir., 1965, 340 F. 2d 712, 719; *United States v. Van Hook*, 7 Cir., 1960, 284 F. 2d 489, 491; *Ayers v. United States*, 9 Cir., 1956, 240 F. 2d 802, 809, cert. denied, 352 U. S. 1016, 77 S. Ct. 563 (1957); *Davis v. United States*, 8 Cir., 1953, 203 F. 2d 853. The action of the board of appeals completely supersedes the action of the local board in classifying appellant although the classification is the same. *Cramer v. France*, 9 Cir., 1945, 148 F. 2d 801; *United States v. Moore*, 7 Cir., 1954, 217 F. 2d 428, 431, 432. If the local board erred, the error was cured by the de novo action of the appeal board. *United States v. Chodorski*, 7 Cir., 1956, 240 F. 2d 590, 593.

The appeal to the Presidential Appeal Board was also de novo.[8] Any error or invalidity in the selective service procedures up to and including the Presidential Appeal Board was cured by de novo consideration by that board which acted in the place and stead of the President himself. One third of the membership of the Presidential Appeal Board (one of three) was a Negro, which is obviously a greater proportion than Negroes bear to the total population. The deci-

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[8] The powers of the President upon an appeal (and necessarily of the Presidential Appeal Board which acts for him) are as follows (50 U.S.C. App. § 460(3)):

> ". . . power to determine all claims or questions with respect to inclusion for, or exemption or deferment from training and service under this title . . . , and the determination of the President shall be final."

"There is no personal appearance before the President's Board, which makes a de novo classification based on the materials in the registrant's file." Comment, *The Selective Service*, 76 Yale L. J. 160, 172 (1966).

sion of the board was unanimous that appellant should be classified 1-A, which action thereby cleared the way for his induction into the armed forces. Nowhere in the record in this case or in appellant's brief do we find any specific charge or evidence of discrimination against appellant because he is a Negro. There are conclusory allegations that the absence of Negroes from local and appeal boards (other than the Presidential Appeal Board) in and of itself establishes discrimination. But we have been unable to find any evidence which shows in the slightest particular that the treatment accorded Clay (Ali) by any board or member thereof was different from that given to any other registrant. Afforded every procedure known to the Act and the regulations, and an appeal to the Presidential Appeal Board to which he was not specifically entitled, appellant's refusal of induction and subsequent trial and conviction by a jury are the result of his own voluntary choice to violate the law of the land.

The contentions of appellant were given final and conclusive consideration by the highest tribunal within the System, a board entirely independent of the Director of Selective Service, and the decision was the same—that appellant be classified 1-A, thereby making him available for induction into the armed forces. The action of the Presidential Appeal Board, a board in which there was no racial imbalance, and the subsequent refusal of appellant to be inducted, are, without more, sufficient to affirm the conviction.

II.

DENIAL OF APPELLANT'S REQUEST FOR PRODUCTION OF CERTAIN DOCUMENTARY AND OTHER EVIDENCE

Prior to trial appellant sought discovery of certain evidence in connection with his allegation of systematic exclusion of Negroes from the System and racial discrimination against him. He moved the Court under Rule 16, Federal Rules of Criminal Procedure, that the Government produce all records of the National Advisory Commission on Selective Service showing the composition of draft boards in Texas and Kentucky and the details of the number of Negroes and whites classified for service and exempt or deferred from induction, other records of the Mark Clark Commission on Selective Service to the House Armed Forces Committee, all of the files of Local Board No. 47, Louisville, Kentucky, relating to registrants who claimed and were granted exemptions, minutes of the meetings of the Presidential Appeal Board and Texas Appeal Board, the entire draft board file of appellant, and the White House transcript of a press conference by the President on March 9, 1967. He also moved to take the oral depositions of Lieutenant General Lewis B. Hershey, the National Director of Selective Service, Washington; United States Representative L. Mendell Rivers, Chairman, House Armed Services Committee, Washington; the members of the National Selective Service Appeal Board and the members of the Texas Ap-

peal Board. General Hershey was requested to bring with him his notes about a public statement on January 31, 1967, in which he predicted appellant would not be deferred. Representative Rivers was requested to bring the notes of his public statement on August 25, 1966, relative to a statement that if Cassius Clay was deferred by the Louisville Board, "You watch what happens in Washington." The members of the National Selective Service Appeal Board were to bring all records and to be examined about the minutes of meetings and communications between them relating to appellant's hearing. The same information was to be obtained from the members of the Texas Appeal Board. Appellant also moved to take the depositions by written interrogatories of the Governors of Texas and Kentucky, the Selective Service Directors of those states, General Hershey, members of the National Selective Service Appeal Board, members of Local Board No. 47, members of the Texas Appeal Board and Representative Rivers. Another application sought issuance of subpoenas duces tecum to Lyndon B. Johnson, President of the United States;[9] Ramsey Clark, Attorney General; General Hershey; the Chairman of Local Board No. 47, Louisville, Kentucky; the Chairman of the Texas Appeal Board; the Director of the National Selective Service Appeal Board, Representative Rivers and the Executive Director of the National Advisory Commission on Selective Service, whereby these witnesses were to produce certain books, papers and documents in their possession called for by the subpoenas.

[9] The request for a subpoena to the President was subsequently withdrawn by appellant's counsel.

A mass of material was, therefore, sought by these discovery techniques. The Trial Judge held a hearing, received briefs and permitted oral argument as to whether the requested discovery should be granted. Appellant's basic contention was that the information sought was necessary to prove systematic exclusion of Negroes in the Selective Service System and that there was lack of procedural due process in the handling of his case. The Government objected to the requested discovery and moved to quash the subpoenas duces tecum, contending that what appellant sought was to put the Selective Service System itself on trial by a congressional-type general investigation. The Government argued against permitting such an investigation of the System, and also that the material sought was irrelevant to any issue which might arise in the criminal trial.

The Government further contended that defense counsel was attempting to explore into the minds and mental processes of the administrative officers named in the subpoenas, was engaging in a "fishing expedition," and that much of the matter sought, though irrelevant, could be obtained from other sources. The District Court refused to order production of the discovery, documentary and other evidence sought by appellant. Nevertheless, much of it found its way into the record at the trial.[10] The

[10] In the present record are the following: Registrant's entire Selective Service file, the Report of the National Advisory Commission on Selective Service showing the percentages of Negroes on local boards throughout the states of the nation, Minutes of the Presidential Appeal Board relating to appellant's case, and the President's Message to the Congress on Selective Service dated March 6, 1967.

measure of discovery permitted by the Rules of Criminal Procedure is not intended to be as broad as in a civil case. Fishing expeditions are the order of the day in a civil action but not in a criminal case for in the latter only limited discovery is permitted. *United States v. Sermon*, D. C., W. D. Mo., 1963, 218 F. Supp. 871, 872, 873. A judge should, therefore, be sensitive to the rules of discovery, which are far more restrictive governing criminal discovery. *Campbell v. Eastland*, 5 Cir., 1962, 307 F. 2d 478, 487. Application for relief under Rule 16, Federal Rules of Criminal Procedure, is a matter within the sound discretion of the Court and the controlling test is whether there has been an abuse of discretion. *Gevinson v. United States*, 5 Cir., 1966, 358 F. 2d 761, 766; *Beatty v. United States*, 5 Cir., 1967, 377 F. 2d 181, 185, reversed on other grounds, 389 U. S. 45, 88 S. Ct. 234 (1967). We believe the District Judge's ruling was correct and that it was made in the exercise of reasonable discretion in the management of the proceeding. What the defense actually sought was to place the Selective Service System itself on trial by a broad, general, though vague and indefinite, investigation into its activities and procedures. Most of the evidence requested was immaterial to any defense which could be raised by appellant at his trial. The statistical information about the representation of Negroes on draft boards generally as well as in Kentucky and Texas was available from other sources and is in the record. It would have been grossly improper to place the members of the Presidential Appeal Board and the Texas Appeal Board

on the witness stand to determine from them what their reasons were for the selective service classification which they gave to appellant in this case. There was, therefore, no error in the ruling of the Trial Judge.

III.

DENIAL OF THE MINISTERIAL EXEMPTION

Scope of Review. In considering the propriety of appellant's classification, and the denial of a ministerial exemption and conscientious objector status, we must keep in mind that the Act provides that decisions of the local boards are final. (50 U.S.C. App. § 460(b)(3).) In the leading and much cited case of *Estep v. United States*, 327 U. S. 114, 122, 66 S. Ct. 423, 427 (1946), the Supreme Court said:

> "The provision making the decisions of the local boards 'final' means to us that Congress chose not to give administrative action under this Act the customary scope of judicial review which obtains under other statutes. It means that the courts are not to weigh the evidence to determine whether the classification made by the local boards was justified. The decisions of the local boards made in conformity with the regulations are final even though they may be erroneous. The question of jurisdiction of the local board is reached only if there is no basis in fact for

> the classification which it gave the registrant."

Therefore, the scope of review of local board decisions in draft cases is very limited and the range of review is the narrowest known to the law. *Matyastik v. United States*, 5 Cir., 1968, ... F. 2d .... [No. 24269, February 12, 1968]; *Blalock v. United States*, 4 Cir., 1957, 247 F. 2d 615.[11] In *Blalock* the Fourth Circuit said:

> "The 'clearly erroneous' rule applied in equity appeals has no place here, nor even the 'substantial evidence' rule of the Administrative Procedure Act, 5 U.S.C.A. § 1009. Congress gave the courts no general authority of revision over draft board proceedings, and we have authority to reverse only if there is a denial of basic procedural fairness or if the conclusion of the board is without any basis in fact. Witmer v. United States, 348 U. S. 375, 75 S. Ct. 392, 99 L. Ed. 428; Goff v. U. S., 4 Cir., 135 F. 2d 610."

The courts do not sit as super draft boards, substituting their judgments on the weight of the evidence, nor should they look for substantial evidence

[11] "The registrant who wants to take his case to court will find little relief from that quarter. Indeed, he will find it difficult to obtain review at all. The courts have allowed review only by habeas corpus after induction and defense to a criminal prosecution for failure to report for induction." (citing *Witmer v. United States*, 348 U. S. 375, 377, 75 S. Ct. 392 (1955) in support of the text) Comment, *The Selective Service*, 76 Yale L. J. 160, 172 (1966).

to support such determinations. *Tamarkin v. United States*, 5 Cir., 1958, 260 F. 2d 436, 437; *Wood v. United States*, 5 Cir., 1967, 373 F. 2d 894, reversed on other grounds, 389 U. S. 20, 88 S. Ct. 3 (1967); *Dickinson v. United States*, 346 U. S. 389, 396, 74 S. Ct. 152, 157 (1953); *Witmer v. United States*, 348 U. S. 375, 75 S. Ct. 392 (1955).

In recent cases we have consistently supported the "basis in fact" test in connection with the classification of draft registrants by local boards. See *Wood v. United States*, 5 Cir., 1967, 373 F. 2d 894, reversed on other grounds, 389 U. S. 20, 88 S. Ct. 3 (1967); *Greer v. United States*, 5 Cir., 1967, 378 F. 2d 931; *Foster v. United States*, 5 Cir., 1967, 384 F. 2d 372; *Jones v. United States*, 5 Cir., 1968, ... F. 2d .... [No. 24565, January 17, 1968]; *Matyastik v. United States*, 5 Cir., 1968, ... F. 2d .... [No. 24269, February 12, 1968].[12]

The Ministerial Exemption. We turn now to the question of the denial of a ministerial exemption to appellant who claims to be a minister of the Lost Found Nation of Islam (Black Muslims). The Act provides that regular or duly ordained ministers of religion shall be exempt from service. (50 U.S.C. App. § 456(g).)

> "The term 'regular minister of religion' means one who as his customary vocation preaches and teaches the principles of re-

[12] For a further discussion of the narrow scope of review in draft cases, see Comment, *Fairness and Due Process Under the Selective Service System*, 114 Penna. L. Rev. 1015, 1019 (1966).

ligion of a church, a religious sect, or organization of which he is a member, without having been formally ordained as a minister of religion, and who is recognized by such church, sect, or organization as a regular minister." (50 U.S.C. App. § 466(g), (2).)

See also 32 C.F.R. § 1622.43 (Selective Service Regulations) which places a regular minister of religion in Class IV-D. Most important, the registrant bears the burden of clearly establishing a right to the ministerial exemption and the board has no affirmative duty to ascertain whether or not the registrant qualifies for the exemption. *Wood v. United States*, 5 Cir., 1967, 373 F. 2d 894, reversed on other grounds, 389 U. S. 20, 88 S. Ct. 3 (1967).

In *Dickinson v. United States*, 346 U. S. 389, 394, 395, 74 S. Ct. 152, 156, 157 (1953), a ministerial exemption case, the Supreme Court said:

"The ministerial exemption, as was pointed out in the Senate Report accompanying the 1948 Act, 'is a narrow one, intended for the leaders of the various religious faiths and not for the members generally.' S. Rep. No. 1268, 80th Cong., 2d Sess. 13. Certainly all members of a religious organization or sect are not entitled to the exemption by reason of their membership, even though in their belief each is a minister. Cf. Cox v. United States, 1947, 332 U. S. 442, 68 S. Ct. 115, 92 L. Ed. 59. On the other hand, a legitimate minister

cannot be, for the purposes of the Act, unfrocked simply because all the members of his sect base an exemption claim on the dogma of its faith. That would leave a congregation without a cleric. Each registrant must satisfy the Act's rigid criteria for the exemption. Preaching and teaching the principles of one's sect, if performed part-time or half-time, occasionally or irregularly, are insufficient to bring a registrant under § 6 (g). These activities must be regularly performed. They must, as the statute reads, comprise the registrant's 'vocation.' And since the ministerial exemption is a matter of legislative grace, the selective service registrant bears the burden of clearly establishing a right to the exemption."

The test, therefore, is whether a registrant, as a vocation, regularly, not occasionally, teaches and preaches the principles of his religion. There must be regularity of religious activities, a ministerial vocation rather than an avocation, and a recognized standing as a minister to a congregation or leader of a group of lesser members of his faith. *Wiggins v. United States*, 5 Cir., 1958, 261 F. 2d 113; *Fitts v. United States*, 5 Cir., 1964, 334 F. 2d 416; *Wood v. United States*, 5 Cir., 1967, 373 F. 2d 894, reversed on other grounds, 389 U. S. 20, 88 S. Ct. 3 (1967); *Greer v. United States*, 5 Cir., 1967, 378 F. 2d 931; *Foster v. United States*, 5 Cir., 1967, 384 F. 2d 372; *Jones v. United States*, 5 Cir., 1968, ... F. 2d ....

[No. 24565, January 17, 1968]; *Matyastik v. United States*, 5 Cir., 1968, ... F.2d .... [No. 24269, February 12, 1968].

Appellant was certified as a minister by the National Secretary of the Lost Found Nation of Islam and by its leader, Elijah Muhammad. He contends that he spends 90% of his time on his ministerial duties. He submitted 43 affidavits and documents said to contain the signatures of 3,612 people testifying to his ministerial activities. Finally he states that there was no evidence in his file upon which a "basis in fact" could be found to support his 1-A classification by the board. We are unable to agree with his statements or contentions. The file indicates that appellant joined his religious sect in January 1964. He has apparently earned his living as a professional boxer for a number of years and became professional heavyweight boxing champion of the world on February 25, 1964. Some years earlier he had won the world light heavyweight boxing championship at the Olympics at Rome. He contends that he became a minister of the Muslims in early 1964. In the first information which he supplied to his local board on selective service forms, his occupation was shown to be that of "professional boxer" and "professional prizefighter." The Report of Medical History dated January 24, 1964 showed his usual occupation to be "boxing." During all this time he made numerous trips to foreign countries to engage in professional bouts which he stated required daily physical training and exercise in preparation for these prizefights.

His Current Information Questionnaire dated February 2, 1966 listed his occupation as a "professional boxer" and his work as "professional fighting." Then, on February 17, 1966, the eventful and important date in this case, his 1-Y classification was changed by the local board to 1-A. Clay (Ali) had never stated to his board or claimed to be a minister or a conscientious objector prior to that time. He wrote Local Board No. 47 on February 14, 1966, just three days prior to his reclassification that "My occupation is professional boxer, and I am at present the Heavyweight Champion of the World." Even when he filled out the Special Form for Conscientious Objector dated February 28, 1966, though claiming to be a member of the Nation of Islam, he did not claim to be a minister. His letter of March 17, 1966 to Local Board No. 47 protested that his reclassification imposed "grave hardship upon me as heavyweight champion of the world at now age 24." When he appeared in person before Local Board No. 47 on March 19, 1966, boxing was listed as his livelihood. The evidence which the local board had before it was much more than necessary to constitute a "basis in fact" for his 1-A classification and denial of the ministerial exemption. His vocation is clearly that of a professional boxer.

IV.

DENIAL OF CONSCIENTIOUS OBJECTOR STATUS

Appellant's claim that he is a conscientious objector began on February 18, 1966, one day after his re-

classification to 1-A, at which time he was furnished the Special Form for Conscientious Objector. He was granted a personal appearance before Local Board No. 47 on March 19, 1966, pursuant to his request. The board's record of that appearance reflects that he claimed hardship on account of taking care of his parents and paying alimony to his former wife. The board's record states, "His religion teaches them not to take part in any way with infidels or any nonreligious group. They fight only in self-defense, not war. Boxing is considered his livelihood." Also, "Clay objects to being in service because he has no quarrel with the Viet Cong. Clay stated that he could not, without being a hypocrit, [sic] take part in anything such as war or anything that is against the Moslim religion." He wrote a lengthy letter to his local board dated April 16, 1966, in which he repeated his hardship request as the sole support of his mother and on account of having to pay alimony to his first wife. He protested that two years of military service would cause him serious financial loss in being unable to pursue his livelihood as a professional boxer.[13] The local board nevertheless reaffirmed the

[13] The pertinent part of the letter to the board reads as follows: "Two years is a very long time in the life of a heavyweight champ—from age 22 when I was classified from 1-A to 1-Y, and my present age 24. From age 24—to age 26 I may never be able to overcome this time of loss of boxing sharpness and come back from the service and earn the kind of money required to pay off these financial obligations, even though they may be abated during the time of military service. I would therefore be in hock for the rest of my life, whereas if I can get in a few more fights, which are lined up through the fall of this year, I should be able to settle these permanent financial obligations from the money I should get within this year, while I am at my peak of shape and am the Heavyweight Champion of the World. A 6-month defense is necessary to retain the title."

1-A classification and the registrant appealed to the appeal board. On May 6, 1966, the complete file was reviewed by the Kentucky Board of Appeals which tentatively determined that the registrant should not be classified in Class 1-O (conscientious objector) or in a lower class. See 32 C.F.R. § 1626.25(a), (b).

The Department of Justice then requested a Federal Bureau of Investigation investigation and a special hearing on the character and good faith of the conscientious objections of the registrant. (32 C.F.R. § 1626.25(d).)[14] The special hearing was held on August 23, 1966, at Louisville, Kentucky, before former Circuit Judge Lawrence Grauman as hearing officer. The hearing officer reported to the Department of Justice that the registrant stated his views in a convincing manner, answered all questions forthrightly, that he was impressed by the statements, believed the registrant was of good character, morals and integrity and sincere in his objection on religious grounds to participation in war in any form. He recommended that his conscientious objector claim be sustained. However, the Department of Justice in a detailed and comprehensive letter opposed his claim[15] and recommended to the Kentucky Board of Appeals that it not be sustained. The Department of Justice concluded that registrant's objections to participation in war insofar as they are based upon the

[14] The regulations follow generally the provisions of the Act on the procedure for considering conscientious objections. See 50 U.S.C. App. § 456(j).

[15] The Department's written objections are to be found in the file in a 17-page letter dated November 25, 1966 to the Chairman of the Appeal Board, Western District of Kentucky.

teachings of the Nation of Islam "rest on grounds which are primarily political and racial. These constitute objections to only certain types of war in certain circumstances, rather than a general scruple against participation in war in any form."[16] The De-

[16] For a penetrating analysis of the beliefs of the Black Muslims, see *Sostre v. McGinnes*, 2 Cir., 1964, 334 F. 2d 906, cert. denied, 379 U. S. 892, 85 S. Ct. 168 (1964). The Court said in that case (at 909):

> "Basic to the problem of prison discipline is the fact that the teachings of Elijah Muhammad include condemnation of the entire white race as wholly 'evil,' composed of devils, murderers, thieves, robbers, scientists at tricks, world snoopers, meddlers and liars.[4] Presenting almost equal difficulty is the Muslims' demand for total segregation between whites and blacks. These Muslims also adopt the position that the Christian religion is loathsome and despicable.[5]

"[4] Elijah Muhammad has said:

" 'The white race or Caucasian European race is known to God and his prophets as Satan, the devil, the enemy of God and his people (the original nation) power was given to them to rule with evil and falsehood the darker nations for six thousand years. They have done and are now forty-six years overtime and they know this. It will take a few years to complete the separation. Nevertheless the work is going on now at a very good rate of speed.'

" 'The truth of the white race will make all black mankind hate them. The truth of the white race and kind will make all black mankind hate them regardless of their color; black, brown, yellow or red. The truth of the white race is a part of that secret which was withheld by Allah to allow them, the devils, to live their time, six thousand years.'

" 'If you understood it right you will agree with me that the whole Caucasian Race is a race of devils.'

"(The quotations are from the Supreme Wisdom containing 'the teachings' of the Honorable Elijah Muhammad. This work was an exhibit in the present case.)

"Malcolm X, at the time a 'minister' of the Muslims, said of an airplane accident in which more than 120 white people were killed:

" 'Well, somebody came and told me that he really had answered our prayers over in France. He dropped an airplane out of the sky with over one hundred twenty white people on it, because the Muslims believe in an eye for an eye and a tooth for a tooth, but thanks to

partment of Justice pointed out that only a general scruple against participation in war in any form can support a claim for conscientious objector status, citing *United States v. Kauten*, 2 Cir., 1943, 133 F. 2d 703.[17] The Department of Justice said that the registrant had not consistently manifested his conscientious objector claim and had not shown overt manifestations sufficient to establish his subjective belief where his claim was not asserted until military service became imminent, not having been made at all prior to being reclassified 1-A in February 1966, and cited in support thereof *Campbell v. United States*, 4 Cir., 1955, 221 F. 2d 454, and *United States v. Corliss*, 2 Cir., 1960, 280 F. 2d 808, cert. denied, 364 U. S. 884, 81 S. Ct. 167 (1960). Numerous statements by the registrant made from time to time were quoted by the Department of Justice in justification of its recommendation against the registrant's conscientious objector claim.[18]

God or Jehovah or Allah we will continue to pray and we hope that every day another plane falls out of the sky.'

"[5] 'Bratcher said in the presence of white officers and white inmates, to another colored inmate, "This goddam Jesus Christ has got to go. He has served the purpose of the white man long enough." ' (Testimony of A. J. Meyer.)"

[17] The Department of Justice's letter said in part: "It seems clear that the teachings of the Nation of Islam preclude fighting for the United States not because of objections to participation in war in any form but rather because of political and racial objections to policies of the United States as interpreted by Elijah Muhammad." (Letter p. 10.)

[18] The special hearing officer quoted the following passage from the registrant's letter to the local board dated February 14, 1966:

"'3. That I am a devoit Muslim and a follower of Islamic religious faith under the discipline of the prophet Elijah Muhammad. To bear arms or kill is against my religion and I conscientiously object to any combat military service that involves the participation in any war in which the lives

The registrant was furnished with a copy of the adverse recommendation of the Department of Justice. The Kentucky Appeal Board thereafter reaffirmed the 1-A classification.

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of human beings is taken. This I do not believe to be righteous. This has been my faith upward of five years.' [sic]"

The Department of Justice's letter recommendation said:

"It should be noted that while the resume statement of the attorney for the sponsoring group did, as noted by the Hearing Officer, express the opinion that registrant sincerely believes that he is conscientiously opposed to military service, the resume also reflects that the attorney believed that registrant would be sincere in his claim as a conscientious objector 'to the extent that registrant can be sincere in a belief'. The resume further reflects that the attorney 'could not be sure how deep any human conviction goes with the registrant' and that he is 'not certain as to what motivates the registrant in this respect.' (Resume, page 5) The attorney added that in view of his past experiences with the registrant changing his mind, he would not be surprised 'if a year from now the registrant becomes disenchanted with the Muslims and voluntarily joins the United States Marines.' The member of the sponsoring group, it should also be noted, stated that 'I'll go to my grave believing registrant basically is a good boy and was brainwashed first by his father and then by the Muslims.' (Resume, page 7)."

At the special hearing, in response to a question of the hearing officer, the registrant stated, "If the Honorable Elijah Muhammad looked me in my face and he who I believe is directly from Allah, Almighty God Allah, and if he looked at me and advised me, which I'm sure he wouldn't, to fight in any kind of war, if he advised me to I would." Then the registrant testified:

"Sir, I said earlier and I'd like to again, to make that plain, that it would be no trouble for me to accept conscientious objector on the basis that I'll go into the Armed Services boxing exhibitions in Viet Nam, or traveling the country at the expense of the Government or living in the easy life and not having to get out in the mud and fight and shoot and if this — — if I could do this, or if it was something I wanted to do, or was in my heart to do if it wasn't against my conscience to do it, I would easily do it. I wouldn't raise all this court stuff and I wouldn't go through all of this and lose and give up the millions that I gave up and my image with the American public that I would say is completely dead and ruined because of us in here now, and so I wouldn't turn down so many millions and jeopardize my life walking the streets of the South and all of America with no bodyguard if I wasn't sincere in every bit of what

Whether the registrant's beliefs are "truly held" is the threshold question of sincerity which must be resolved by the board. *United States v. Seeger*, 380 U. S. 163, 185, 85 S. Ct. 850, 863 (1965).[19] The "basis in fact" test applied to the conscientious objector claim of registrant was fully met in this case.

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the Holy Qur'an and the teachings of the Honorable Elijah Muhammad tell us and it is that we are not to participate in wars on the side of nobody who—on the side of non-believers, and this is a Christian country and this is not a Muslim country, and the Government and the history and the facts shows that every move toward the Honorable Elijah Muhammad is made to distort and is made to ridicule him and is made to condemn him and the Government has admitted that the police of Los Angeles were wrong about attacking and killing our brothers and sisters and they were wrong in Newark, New Jersey, and they were wrong in Louisiana, and the outright, everyday oppressors and enemies are the people as a whole, the whites of this nation. So, we are not, according to the Holy Qur'an, to even as much as aid in passing a cup of water to the—even a wounded. I mean, this is in the Holy Qur'an, and as I said earlier, this is not me talking to get the draft board—or to dodge nothing. This is there before I was borned and it will be there when I'm dead and we believe in not only that part of it, but all of it."

The registrant affirmed at the hearing that he was correctly quoted by the *Chicago Daily News* on February 18, 1966, the day after his reclassification to 1-A, as follows:

"I am a member of the Muslims and we don't go to no war unless they are declared by Ali himself. I don't have no personal quarrel with those Vietcongs.

* * *

"Let me tell you, we Muslims are taught to defend ourselves when we are attacked. Those Vietcong are not attacking me. These Vietcong are fighting a very nasty war over there. There is a lot of people getting killed. Why should we Muslims get involved? Besides, I am fighting for the government every day. I am laying my life on the line for the government. Nine out of ten soldiers would not want to be in my place in the ring. It is too dangerous."

[19] The Third Circuit recently rejected the claim of a Roman Catholic for conscientious objector classification who said he would fight only in a "just war" and that denial of such classification would violate his federally protected right to religious freedom and equal protection of the law. *United States v. Spiro*, 3 Cir., 1967, 384 F. 2d 159, cert. denied, ... U. S. ...., 88 S. Ct. 1028 (1968).

There was more than adequate evidence to justify the rejection of his claim.

V.

THE BILL OF ATTAINDER

The Constitution prohibits the passing of a bill of attainder by Congress, Art. I, § 9, Cl. 3, and a bill of attainder is said to be a legislative act which inflicts punishment without a judicial trial. *Cummings v. The State of Missouri,* 71 U. S. (4 Wall.) 277 (1867). As interpreted by the Supreme Court, this clause prohibits all legislative acts "no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial . . . . ." *United States v. Lovett,* 328 U. S. 303, 315, 66 S. Ct. 1073, 1078 (1946). Accordingly, appellant contends that the whole proceeding of his classification and induction into the military service constituted a prohibited bill of attainder. The only issue submitted to the jury at his trial was whether he refused to take the step forward at the induction ceremony. Appellant contends in brief that "Every important factual adjudication was extra judicially made by administrative bodies operating under the Act." Since the draft board's authority flows from congressional enactment, appellant argues that Congress has subjected him to a non-judicially imposed penalty in a non-judicial forum. He maintains that he was classified without a judicial trial.

So far as the trial proceedings before the District Court are concerned, there was no irregularity or failure to provide due process of law. The District Judge informed the jury that he had examined the defendant's Selective Service File and found, as a matter of law, that there was a basis in fact for the 1-A classification given the registrant. The jury was instructed that it was not to consider the question of whether or not the defendant was entitled to this classification for this determination was not for the jury. This ruling and instruction was in exact conformity with the Supreme Court's teaching in *Cox v. United States*, 332 U. S. 442, 452, 453, 68 S. Ct. 115, 120 (1947), where the Court said:

> "Whether there was 'no basis in fact' for the classification is not a question to be determined by the jury on an independent consideration of the evidence. The concept of a jury passing independently on an issue previously determined by an administrative body or reviewing the action of an administrative body is contrary to settled federal administrative practice; the constitutional right to jury trial does not include the right to have a jury pass on the validity of an administrative order."

Proceedings before local and appeal boards are informal and are stripped of the panoply of formal judicial tribunals. *United States v. Pitt*, 3 Cir., 1944, 144 F. 2d 169, 172. Such proceedings are non-judicial in nature and are clearly non-criminal, for appellant

was neither a suspect nor an accused and he was appearing before the boards which were giving him a hearing only in an administrative proceeding. *United States v. Sturgis*, 3 Cir., 1965, 342 F. 2d 328, 332. It is true that appellant sought a judicial determination of his case prior to induction, and the decision was adverse in every tribunal to which he presented this issue. The Sixth Circuit, in declining to grant him an injunction pending his appeal from the decision of the Kentucky Federal District Court, said:

> "We do not believe that Congress ever intended that draftees should have the right to litigate the validity of their induction before acceptance for National Service. If injunction suits were permitted, interminable delays would undoubtedly result while the cases were being processed in the Courts. Such a procedure would interfere with the orderly proceedings of the draft boards and prevent them from filling their quotas and supplying the armed forces with much needed personnel." *Muhammad Ali v. Breathitt*, 6 Cir., April 17, 1967, Docket No. 17834, unpublished.

Similar relief was also denied by the Fifth Circuit by its numerous orders to which we have previously referred.

The most recent amendment to the draft law (now called the Military Selective Service Act of 1967) permits judicial review only "as a defense to a criminal prosecution instituted. . . after the registrant has

responded either affirmatively or negatively to an order to report for induction."[20] The amendment was undoubtedly Congress' answer to the holding in *Wolff v. Selective Service Local Board No. 16*, 2 Cir., 1967, 372 F. 2d 817, in which the Second Circuit upheld preinduction judicial review[21] of a selective service classification which allegedly infringed upon the constitutional right to free speech. That case involved the reclassification of deferred students, making them available for military duty because of participation in Viet Nam. Preinduction consideration was afforded petitioners on the narrow constitutional ground that the reclassification would have a continued chilling effect, *Dombrowski v. Pfister*, 380 U. S. 479, 85 S. Ct. 1116 (1965), on them by being subjected to the added sanction of induction. It is

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[20] 50 U.S.C. App. § 460(b)(3), as amended in 1967, reads as follows:

> "No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution instituted under section 12 of this title, after the registrant has responded either affirmatively or negatively to an order to report for induction, or for civilian work in the case of a registrant determined to be opposed to participation in war in any form: *Provided*, That such review shall go to the question of the jurisdiction herein reserved to local boards, appeal boards, and the President only when there is no basis in fact for the classification assigned to such registrant."

[21] "While there was no serious question that eventually petitioners would be able to secure review, *Wolff* is the first case allowing direct judicial review of a registrant's classification prior to induction. It had been held almost without exception that aggrieved registrants could not challenge the determinations of their local boards in the courts except by either submitting to induction and seeking habeas corpus relief, or by refusing induction and securing review by way of a defense to a criminal prosecution." Comment, 81 Hary. L. Rev. 685, 686 (1968).
The Government did not file a petition for certiorari in the *Wolff* case.

clear by the 1967 amendment to the Act that Congress intends there be no preinduction judicial proceedings which would interfere with the orderly drafting of needed manpower for the armed forces. *DuVernay v. United States*, 5 Cir., 1968, ... F. 2d .... [No. 24132, February 7, 1968]. Judicial review prior to induction, even on constitutional grounds, is an open invitation to a large volume of litigation, much of which we could expect would undoubtedly be based on frivolous grounds in an attempt to delay or evade military service. As the Supreme Court said in *Falbo v. United States*, 320 U. S. 549, 554, 64 S. Ct. 346, 349 (1944):

> "The circumstances under which the Act was adopted lend no support to a view which would allow litigious interruption of the process of selection which Congress created. To meet the need which it felt for mobilizing national manpower in the shortest practicable period, Congress established a machinery which it deemed efficient for inducting great numbers of men into the armed forces. Careful provisions were made for fair administration of the Act's policies within the framework of the selective service process. But Congress apparently regarded 'a prompt and unhesitating obedience to orders' issued in that process 'indispensable to the complete attainment of the object' of national defense. Martin v. Mott, 12 Wheat. 19, 30, 25 U. S. 19, 30, 6 L. Ed. 537. Surely if Congress had intended to authorize interference with that

process by intermediate challenges of orders to report, it would have said so."

The registrant's remedy is in defense to a criminal prosecution if he declines induction, and habeas corpus if he accepts induction but is still aggrieved by the classification process. *Witmer v. United States*, 348 U. S. 375, 377, 75 S. Ct. 392, 394 (1955).[22]

In the present matter the registrant fully exhausted all administrative remedies available to him. In that respect the case differs from *DuVernay v. United States*, 5 Cir., 1968, ... F. 2d .... [No. 24132, February 7, 1968], where we affirmed the conviction of *DuVernay* because of his failure to exhaust administrative remedies. We also pointed out in footnote 6 of that case (.... F. 2d ....) that as to the attack on the racial composition of the local board, since draft board members are public officers appointed by the President, a challenge to the composition of the board indirectly challenges the qualifications of the present members and their eligibility to perform their duties. We said that the public officers'

[22] In *Schwartz v. Strauss*, 1953, 206 F. 2d 767, the Second Circuit affirmed on the opinion below (114 F. Supp. 438) the District Court's denial of relief to a plaintiff who sought a preinduction declaratory judgment and an injunction "claiming that his selective service classification is erroneous as a matter of law and that he is thereby deprived of certain constitutional rights." The District Court said "that there are many authorities that do not permit judicial review before induction" and that "the Congressional intent was to keep the administrative process of the Selective Service System free from the delays and disruption incident to court interference prior to induction." The Court said that "plaintiff's remedy is by way of habeas corpus after induction or by refusing to be inducted after the administrative process is complete." 114 F. Supp. at 439.

authority was not subject to collateral attack in the criminal proceeding but must be challenged by direct attack. *DuVernay's* conviction, however, was not affirmed on that issue but on the failure of the draftee to exhaust administrative remedies. While it is true that qualifications of a public officer generally may not be collaterally attacked, the charge of systematic exclusion of Negroes from draft boards in this case, where all administrative remedies have been exhausted, is of constitutional proportions and warrants our consideration and disposition of that issue. We do not view appellant's contention here as requiring the removal of draft board members because of so-called systematic exclusion or racial imbalance, but that appellant seeks to have their acts declared invalid as to him. It is apparent that the systematic exclusion contention must, therefore, be decided. Accordingly, we have given full consideration to that contention, now urged in this criminal proceeding, though we believe it is not applicable insofar as draft board membership is concerned, and, at the least, that the acts of such boards are de facto valid and binding. *United States v. Commonwealth of Pennsylvania*, D. C., W. D. Penna., 1963, 214 F. Supp. 913; *United States v. Lindsley*, 7 Cir., 1945, 148 F. 2d 22, cert. denied, 325 U. S. 858, 65 S. Ct. 1195 (1945). There is no question involved here of the board acting beyond its jurisdiction in classifying and attempting to induct appellant who, under the Act and regulations, is clearly a proper subject for military service in the armed forces of the United States. Since under the Act and the settled law the system-

atic exclusion contention may not properly be raised prior to induction, we have concluded that it is reasonable, all administrative and other remedies having been exhausted by appellant, that we meet the issue squarely and resolve it, which we have done.[23]

There is no merit to the bill of attainder argument as we have seen.

The conviction and sentence are, therefore, AFFIRMED.

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[23] Appellant raised another issue which is without merit. He claimed deprivation of due process because of the inclusion in his Selective Service File of numerous letters and newspaper clippings alleged to be prejudicial, and also because of pre-final classification statements of General Hershey, the National Director, and Congressman Rivers, Chairman of the House Armed Services Committee. We have heretofore described the statements of General Hershey and Congressman Rivers in Chapter II of this opinion. The record shows quite clearly that it is the practice of local boards to place all correspondence relating to a registrant in his file. A number of letters and clippings from members of the general public protesting the delay in inducting appellant were received by the board and filed. The record is devoid of any indication that these letters and clippings played any part whatsoever in the ultimate classification of appellant. That is also true of the statements of the General and Congressman. As to General Hershey's statement, we have already shown that board is independent of the National Director as provided in 32 C.F.R. § 1604.6(a), (b), (c), and it was General Hershey who caused an appeal of registrant's case to the Presidential Appeal Board. Obviously it is the right of Congressmen to express opinions on matters of public interest, including registrant's draft case. But nothing in the record of this case shows that Congressman Rivers' statement had any effect on the classification of appellant.

Adm. Office, U. S. Courts—E. S. Upton Printing Co., N. O., La.

Judgment and Order Denying Rehearing

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

May 6, 1968

Issued as Mandate:

On Petition for Rehearing En Banc

(June 6, 1968)

Before COLEMAN, AINSWORTH and DYER, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is Denied and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 25(a), subpar. (b), the Petition for Rehearing En Banc is Denied.

Transcript of District Court's Oral Findings

(Rendered June 20, 1967; Record, 239-44)

The Court:

Well, I have read the draft board file and I have reached the conclusion there is ample evidence in the file to support the action of the draft board. Mr. Covington has said basis in fact must be found in the draft board file, and I think it is found here.

Now, just to summarize some of the evidence that I find that I conclude does support the action of the draft board, first I want to describe the file. I am doing this for the record, not because counsel on either side need it described for them. You know it as well as I do. It is not the neatest of files. There are many pages in it. To begin with there is I think the main portion of the file, just a group of loose sheets in the file and they are not arranged chronologically. They are numbered for convenience and identification consecutively as they appear in that file; but they are not in any chronological or other logical form, logical sequence.

I will ask that we have order in the courtroom. I do not intend to be facetious and what I say is not calculated to inspire laughter and what I had to say is serious. At least it is serious to me and I am sure it is serious to the Defendant and I hope it is serious to prosecution.

I am going to refer to these pages by the pencil figures that appear thereon. In other sections of the file there is pointed out there is quite a volume of petitions signed by brothers of the Defendant's religious faith. Most of them are on mimeographed forms. There are some variations in

the forms. You will find one form an identical form with many signatures on those petitions, and then another form. I read the various forms and observed that there are quite a number of signatures. I will take counsel's word for the number of signatures appearing thereon. I did not count the signatures. I did observe there are quite a volume of them.

Then there are those other miscellaneous—what Mr. Covington has referred to and I refer to as crank letters of people advising the draft board what to do, just as I have received many advising me what I should do. I did not even read them. I have asked my secretary to file them according to states. If we ever have to refer to them, we will refer to them in that way. I don't anticipate that we will.

I will say for the record out of the presence of the jury that I have received quite a volume of what I call crank mail and have received some telegrams. Most of them start off with the statement that they are not presuming to tell me what to do, and then they proceed to do that. That is the form of most of the letters I receive asking for jury excuses. In paragraph 1 they protest how concientious they are of their civic responsibility and in paragraph 2 why they don't want to serve.

Proceeding further, in referring to matters in the file which I believe prove the basis in fact for the action of the draft board, and I'm not referring to any crank letters, I am not referring to newspaper clippings, and again I want to say that these letters are not arranged chronologically and I am referring to them in the order in which they appear in the file, which is not a chronological order.

On page 260 is a letter dated October 19, 1966. This was after the Defendant has made his claim for ministerial

exemption. It is a typewritten letter and it is signed by the registrant, the Defendant himself, and in that letter addressed to the draft board he asks leave to go to Mexico to negotiate a fight and to observe his prospective opponent in action. He didn't say anything in that letter that he was going there to preach the word of Allah or to seek converts, but his request to leave the country to go to Mexico was to negotiate a fight and to observe his prospective opponent in action. I think that would give some support to the finding of the draft board that he was a professional boxer as he claimed to be.

Then on page 467 is another letter, typewritten letter, signed by the registrant, the Defendant Clay, dated July 7, 1966. This letter was before his claim for ministerial exemption. The previous one was after. In that letter he asked leave to go to England to defend his world heavy weight championship and he also advised in that letter he would later want to go to Germany to defend his title there.

But again in the letter to the draft board the proposition of his projected visits out of the country to England and to Germany to defend his heavy weight championship. Again, he made no mention that he was going to those countries or that he would be going to those countries to preach the word of Allah.

Then at page 458 is another letter, typewritten and signed by registrant, Defendant Clay, dated August 8, 1966, which was a short time before he made his claim for ministerial exemption. In that letter he asked leave to go to Germany to defendant [*sic*] his world heavy weight championship there. He stated in his letter previously that he would have such a request. In July he told them he would have a request to go to Germany and, true to his

word, he did have such a request to go there, and why, to defend his world heavy weight championship there. Again, the request was not to go there for the purpose of preaching the word of Allah.

Then page 474 is another letter in his own handwriting signed by the registrant, Defendant Clay. This letter is dated April 26, 1966, and in this letter he asked to go to England to defend his world heavy weight boxing title. Again, no mention that he wanted to go there to preach the word of Allah.

At page 491 is another letter in his own handwriting and signed by the registrant, Defendant Clay, dated March 17, 1966, in which he protests the reclassification by the draft board and in his letter he states the reasons he does so protest. He protests his reclassification for the reason that the reclassification has and does at this time impose great hardship upon me as heavy weight champion of the world now at age 24. He asked the draft board to reconsider his classification. That is his protest, because of hardship. He says nothing there about a ministerial exemption.

Then at page 504, letter dated April 16, 1966 in his handwriting, signed by the registrant, Defendant Clay. This is a month later than the previous letter. Again, he protests his reclassification for the following reasons:

A, he says he is the sole support of his mother. B, because he had just gone through an expensive divorce and made a settlement of $150,000 on his wife and was required to pay her $1250.00 per month alimony, the conclusions being he couldn't do that on a soldier's pay. But, again, he protests his reclassification for entirely different reasons. I don't know why he didn't think then to claim that he was a minister, but he did not.

Then at page 524 appears another letter dated February 14, 1966, in his own handwriting. The letter is signed by

the registrant, Defendant Clay. He protests his reclassification for the following reasons:

One, my occupation is professional boxer—and he goes on with that explanation. Two, that he married August 14, 1964, divorced January 11, 1966 because his wife failed to comply with her premarital agreement as to the tenets of the Muslim faith. Then a divorce was expense. Three, that he is a devout Muslim and has convictions also against killing or bearing arms. Now, in this letter he protests his Muslim faith, his Muslim religion, but he does not say that he is a minister. He says that his marriage broke up because his wife did not follow through with her premarital agreement with the tenets of his faith, the Muslim faith, and then he says that he is a devout Muslim and has conscientious scruples against killing or bearing arms, but he makes no claim to being a minister.

Now, we are well aware that the Selective Service Act recognizes conscientious objectors. As I remember it, a conscientious objector may be assigned to non-combatant duty in the armed forces of the United States or he may be assigned to work of national importance under civilian direction. But that problem has never been brought to you. I don't think he has said in so many words, "I am an conscientious objector, I do not believe in killing or bearing arms and therefore I want to be assigned to non-combatant duty or to work of national importance under civilian direction."

I think the basis in fact for the action of the draft board is amply supported by the evidence appearing in the file, and I find that there was basis in fact for such action. I deny the motion for acquittal upon all of the grounds asserted.

It is now five minutes after four. How much time will you gentlemen want to present your arguments?

Pertinent Texts of Constitutional and Statutory Provisions and Regulations Involved

United States Constitution

Article I, §9, cl. 3:

> No Bill of Attainder or ex post facto Law shall be passed.

Amendment I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV, §1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Universal Military Training and Service Act, as appearing in 50 U. S. C. App. §§451–63 immediately prior to the adoption of the Military Selective Service Act of 1967:

§451(c):

> The Congress further declares that in a free society the obligations and privileges of serving in the armed forces and the reserve components thereof should be shared generally, in accordance with a system of selection which is fair and just, and which is consistent with the maintenance of an effective national economy.

§455(a):

> The selection of persons for training and service under section 4 [section 454 of this Appendix] shall be made in an impartial manner, under such rules and regulations as the President may prescribe, from the persons who are liable for such training and service and who at the time of selection are registered and classified, but not deferred or exempted: *Provided,* That in the selection of persons for training and service under this title [sections 451–454 and 455–471 of this

Appendix], and in the interpretation and execution of the provisions of this title [said sections], there shall be no discrimination against any person on account of race or color . . . .

§456(g):

Regular or duly ordained ministers of religion, as defined in this title [sections 451–454 and 455–471 of this Appendix], and students preparing for the ministry under the direction of recognized churches or religious organizations, who are satisfactorily pursuing full-time courses of instruction in recognized theological or divinity schools, or who are satisfactorily pursuing full-time courses of instruction leading to their entrance into recognized theological or divinity schools in which they have been pre-enrolled, shall be exempt from training and service (but not from registration) under this title [said sections].

§456(j):

Nothing contained in this title [sections 451–454 and 455–471 of this Appendix] shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. Any person claim-

ing exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title [said sections], be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4 (b) [section 454 (b) of this Appendix] such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title [section 462 of this Appendix], to have knowingly failed or neglected to perform a duty required of him under this title [sections 451–454 and 455–471 of this Appendix]. Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall,

after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) if the objector is inducted into the armed forces under this title [said sections], he shall be assigned to noncombatant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of such induction be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4 (b) [section 454 (b) of this Appendix] such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title [sections 451–454 and 455–471 of this Appendix].

§460(b)(3):

(3) to create and establish within the Selective Service System civilian local boards, civilian appeal boards, and such other civilian agencies, including agencies of appeal, as may be necessary to carry out its functions with respect to the registration, examination, classification, selection, assignment, delivery for induction, and maintenance of records of persons registered under this title [said sections], together with such other duties as may be assigned under this title [said sections]. He shall create and establish one or more local boards in each county or political sub-

division corresponding thereto of each State, Territory, and possession of the United States, and in the District of Columbia. Each local board shall consist of three or more members to be appointed by the President from recommendations made by the respective governors or comparable executive officials . . . . No member of any local board shall be a member of the armed forces of the United States, but each member of any local board shall be a civilian who is a citizen of the United States residing in the county or political subdivision corresponding thereto in which such local board has jurisdiction, and each intercounty local board shall have at least one member from each county or political subdivision corresponding thereto included within the intercounty local board area. Such local boards, or separate panels thereof each consisting of three or more members, shall, under rules and regulations prescribed by the President, have the power within the respective jurisdictions of such local boards to hear and determine, subject to the right of appeal to the appeal boards herein authorized, all questions or claims with respect to inclusion for, or exemption or deferment from, training and service under this title [said sections], of all individuals within the jurisdiction of such local boards. The decisions of such local board shall be final, except where an appeal is authorized and is taken in accordance with such rules and regulations as the President may prescribe. There shall be not less than one appeal board located within the area of each Federal judicial district in the United States and within each Territory and possession of the United States, and such additional separate panels thereof, as may be prescribed by the President. Ap-

peal boards within the Selective Service System shall be composed of civilians who are citizens of the United States and who are not members of the armed forces. The decision of such appeal boards shall be final in cases before them on appeal unless modified or changed by the President. The President, upon appeal or upon his own motion, shall have power to determine all claims or questions with respect to inclusion for, or exemption or deferment from training and service under this title [said sections], and the determination of the President shall be final. No person who is a civilian officer, member, agent, or employee of the Office of Selective Service Records or the Selective Service System, or of any local board or appeal board or other agency of such Officer or System, shall be excepted from registration or deferred or exempted from training and service, as provided for in this title [said sections], by reason of his status as such civilian officer, member, agent, or employee . . . .

§462(a):

(a) Any member of the Selective Service System or any other person charged as herein provided with the duty of carrying out any of the provisions of this title [sections 451–454 and 455–471 of this Appendix], or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, and any person charged with such duty, or having and exercising any authority under said title [said sections], rules, regulations, or directions who shall knowingly make, or be a party to the making, of any false, improper, or incorrect registration, classification, physical or mental examination, defer-

ment, induction, enrollment, or muster, and any person who shall knowingly make, or be a party to the making of, any false statement or certificate regarding or bearing upon a classification or in support of any request for a particular classification, for service under the provisions of this title [said sections], or rules, regulations, or directions made pursuant thereto, or who otherwise evades or refuses registration or service in the armed forces or any of the requirements of this title [said sections], or who knowlingly counsels, aids, or abets another to refuse or evade registration or service in the armed forces or any of the requirements of this title [said sections], or of said rules, regulations, or directions, or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title [said sections], or rules, regulations or directions made pursuant to this title [said sections], or any person or persons who shall knowingly hinder or interfere or attempt to do so in any way, by force or violence or otherwise, with the administration of this [said sections] or the rules or regulations made pursuant thereto, or who conspires to commit any one or more of such offenses, shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment, or if subject to military or naval law may be tried by court martial, and, on conviction shall suffer such punishment as a court martial may direct. . . .

Regulations

Selective Service Regulations, 32 C. F. R. Part 1600.

1600.735-1 Conduct Requirements in General.—(a) The maintenance of unusually high standards of honesty, integrity, impartiality, and conduct by Government employees and special Government employees is essential to assure the proper performance of the Government business and the maintenance of confidence by citizens in their Government.

(b) Employees of the Selective Service System shall conduct themselves in such a manner that the work of the System is effectively accomplished; shall be courteous, considerate, and prompt in dealing with or serving the public; and shall conduct themselves in both their official and personal lives in a manner that will not bring discredit or embarrassment to the Selective Service System.

(c) Employees shall observe the applicable laws and regulations governing participation in political activities; avoid any discrimination because of race, color, religion, national origin, or sex; economically utilize, protect, and conserve Federal property entrusted to them; and conduct all their official activities in a manner which is above reproach and free from any indiscretions or acceptance of gratuities or favors which would cast doubt or suspicion upon themselves or the administration of the Selective Service System.

1600.735-2 Definitions.—The following definitions shall govern in this interpretation of regulations in this part.

(a) "Employee" means an officer or employee of the Selective Service System including uncompensated per-

sons, but does not include a special Government employee or a member of the uniformed services.

1604.1 Director of Selective Service.—The Director of Selective Service shall be responsible directly to the President. The Director of Selective Service is hereby authorized and directed:

(a) To prescribe such rules and regulations as he shall deem necessary for the administration of the Selective Service System, the conduct of its officers and employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property.

(b) To issue such public notices, orders, and instructions as shall be necessary for carrying out the functions of the Selective Service System.

1604.6 National Selective Service Appeal Board.

(b) The National Board is authorized and directed to perform all the functions and duties vested in the President by that sentence of section 10 (b) (3) of the Military Selective Service Act of 1967, which reads as follows: "The President, upon appeal or upon his own motion, shall have power to determine all claims or questions with respect to inclusion for, or exemption or deferment from training and service under this title, and the determination of the President shall be final."

1604.11 Governor.—The Governor of each State is authorized to recommend a person to be appointed by the President as State Director of Selective Service for his State, who shall represent the Governor in all selective service matters.

1604.12 State Director of Selective Service.—Subject to the direction and control of the Director of Selective Service, the State Director of Selective Service for each State shall be in immediate charge of the State Headquarters for Selective Service and shall be responsible for carrying out the functions of the Selective Service System in his State. The State Headquarters for Selective Service shall be an office of record for selective service operations only, and no records other than selective service records shall be maintained in such office.

1604.21 Area . . . In each State which is divided into two or more Federal judicial districts, except the State of New York and the City of New York, each State Director of Selective Service shall establish for each such district an appeal board area which shall comprise the entire district. . . .

1604.22 Composition and Appointment.—For each appeal board area an appeal board, normally of five members, shall be appointed by the President, upon recommendation of the Governor. The members shall be male citizens of the United States who are not members of the armed forces or any reserve component thereof; they shall be residents of the area in which their board is appointed; and they shall be at least 30 years old. The appeal board should be a composite board, representative of the activities of its area, and as such should include one member from labor, one member from industry, one physician, one lawyer, and, where applicable, one member from agriculture. . . .

1604.24 Jurisdiction.—The appeal board shall have jurisdiction to review and to affirm or change any decision

appealed to it from any local board in its area or any decision appealed from any local board not in its area when such appeal is either transferred to it in the manner provided in these regulations, or is appealed to it by or on behalf of any registrant whose principal place of employment is located in its area or submitted to it in the manner required by law.

1604.25 **Disqualification.**—No member of an appeal board shall act on the case of a registrant who is his first cousin or closer relative, either by blood, marriage, or adoption, or who is an employer, employee, or fellow employee, or stands in the relationship of superior or subordinate in connection with any employment, or is a partner or close business associate of the member. If because of such provision, or for any other reason, an appeal board cannot act on the case of a registrant, and there is no panel of the appeal board to which the case may be transferred, the appeal board shall transmit such case to the State Director of Selective Service for transfer to another appeal board.

1604.52 **Composition and Appointment.**—(a) A local board of three or more members shall be appointed for each local board area by the President upon recommendation of the Governor.

(b) A local board of three or more members, with at least one member from each county included within the intercounty local board area, shall be appointed for each intercounty local board area by the President upon recommendation of the Governor.

(c) The members of local boards shall be male citizens of the United States who shall be residents of a county in which their local board has jurisdiction and who shall also, if at all practicable, be residents of the area in which their local board has jurisdiction. No member of a local board shall be a member of the armed forces or any reserve component thereof. Members of local boards shall be at least 30 years of age.

1604.54 Jurisdiction.—The jurisdiction of each local board shall extend to all persons registered in, or subject to registration in, the area for which it was appointed. It shall have full authority to do and perform all acts within its jurisdiction authorized by the selective service law.

1604.55 Disqualification.—(a) No member of a local board shall act on the case of a registrant who is his first cousin or closer relation, either by blood, marriage, or adoption, or who is an employee or employer, or who is a fellow employee, or stands in the relation of superior or subordinate in connection with any employment, or is a partner or close business associate of the member. If because of this provision a majority of a local board cannot act on the case of a registrant, the local board shall request the State Director of Selective Service to designate another local board to which the registrant shall be transferred for action on his case.

1622.1 General Principles of Classification.

(b) Classification is the key to selection and it must be accomplished in the spirit of the Military Selective Service Act of 1967, in which the Congress has declared "that in a free society the obligations and privileges of serving in the

armed forces and the reserve components thereof should be shared generally, in accordance with a system of selection which is fair and just, and which is consistent with the maintenance of an effective national economy."

(c) It is the local board's responsibility to decide, subject to appeal, the class in which each registrant shall be placed. Each registrant will be considered as available for military service until his eligibility for deferment or exemption from military service is clearly established to the satisfaction of the local board. The local board will receive and consider all information, pertinent to the classification of a registrant, presented to it. The mailing by the local board of a Classification Questionnaire (SSS Form 100) to the latest address furnished by a registrant shall be notice to the registrant that unless information is presented to the local board, within the time specified for the return of the questionnaire, which will justify his deferment or exemption from military service the registrant will be classified in Class I-A.

(d) In classifying a registrant there shall be no discrimination for or against him because of his race, creed, or color, or because of his membership or activity in any labor, political, religious or other organization. Each such registrant shall receive equal justice.

1622.14 Class I-O: Conscientious Objector Available for Civilian Work Contributing to the Maintenance of the National Health, Safety, or Interest.—(a) In Class I-O shall be placed every registrant who would have been classified in Class I-A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to participation in war in any form and

to be conscientiously opposed to participation in both combatant and noncombatant training and service in the armed forces.

(b) Section 6(j) of title I of the Universal Military Training and Service Act, as amended, provides in part as follows:

> "Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code."

1622.43 Class IV-D: Minister of Religion or Divinity Student.—(a) In Class IV-D shall be placed any registrant:

(1) Who is a regular minister of religion;

(2) Who is a duly ordained minister of religion;

(3) Who is a student preparing for the ministry under the direction of a recognized church or religious organization and who is satisfactorily pursuing a full-time course of instruction in a recognized theological or divinity school; or

(4) Who is a student preparing for the ministry under the direction of a recognized church or religious organization and who is satisfactorily pursuing a full-time course of instruction leading to entrance into a recognized theological or divinity school in which he has been pre-enrolled.

(b) Section 16 of the Military Selective Service Act of 1967, contains in part the following provisions:

"SEC. 16. When used in this act— * * * (g) (1) the term 'duly ordained minister of religion' means a person who has been ordained, in accordance with the ceremonial, ritual, or discipline of a church, religious sect, or organization established on the basis of a community of faith and belief, doctrines and practices of a religious character, to preach and to teach the doctrines of such church, sect, or organization and to administer the rites and ceremonies thereof in public worship, and who as his regular and customary vocation preaches and teaches the principles of religion and administers the ordinances of public worship as embodied in the creed or principles of such church, sect, or organization.

"(2) The term 'regular minister of religion' means one who as his customary vocation preaches and teaches the principles of religion of a church, a religious sect, or organization of which he is a member, without having been formally ordained as a minister of religion, and who is recognized by such church, sect, or organization as a regular minister.

"(3) The term 'regular or duly ordained minister of religion' does not include a person who irregularly or incidentally preaches and teaches the principles of religion of a church, religious sect, or organization and does not include any person who may have been duly ordained a minister in accordance with the ceremonial, rite, or discipline of a church, religious sect or organization, but who does not regularly, as a vocation, teach and preach the principles of religion and administer the ordinances of public worship as embodied in the creed or principles of his church, sect, or organization."

1622.60 Director May Direct That Eligibility for Particular Classification Be Disregarded.—The Director of Selective Service, notwithstanding any other provisions of the regulations in this chapter, may direct that any registrant shall be classified or reclassified without regard to his eligibility for a particular classification.

1624.1 Opportunity to Appear in Person.—(a) Every registrant after his classification is determined by the local board, except a classification which is determined upon an appearance before the local board under the provisions of this part, shall have an opportunity to appear in person before the member or members of the local board designated for the purpose if he files a written request therefor within 10 days after the local board has mailed a Notice of Classification (SSS Form No. 110) to him. Such 10-day period may not be extended.

(b) No person other than a registrant shall have the right to appear in person before the local board, but the local board may, in its discretion, permit any person to appear before it with or on behalf of a registrant: *Provided,* That if the registrant does not speak English adequately he may appear with a person to act as interpreter for him: *And provided further,* That no registrant may be represented before the local board by anyone acting as attorney or legal counsel.

1625.2 When Registrant's Classification May Be Reopened and Considered Anew.—The local board may reopen and consider anew the classification of a registrant (a) upon the written request of the registrant, the government appeal agent, any person who claims to be a dependent of the registrant, or any person who has on file a

written request for the current deferment of the registrant in a case involving occupational deferment, if such request is accompanied by written information presenting facts not considered when the registrant was classified, which, if true, would justify a change in the registrant's classification; or (b) upon its own motion if such action is based upon facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification; provided, in either event, the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction (SSS Form 252) or an Order to Report for Civilian Work and Statement of Employer (SSS Form 153) unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control.

1626.23 Preliminary Review.—The appeal board will carefully check each file to determine whether all steps required by the regulations have been taken, whether the record is complete, and whether the information in the file is sufficient to enable it to determine the registrant's classification. If any steps have been omitted by the local board, if the record is incomplete, or if the information is not sufficient to enable the appeal board to determine the classification of the registrant, the appeal board shall return the file to the local board with a request for additional information or action. . . .

1626.24 Review by Appeal Board.—(a) The appeal board shall consider appeals in the order in which they are received unless otherwise directed by the Director of Selective Service, in which event, they shall be considered

in such order as the Director of Selective Service shall prescribe.

(b) In reviewing the appeal and classifying the registrant, the appeal board shall not receive or consider any information other than the following:

(1) Information contained in the record received from the local board.

(2) General information concerning economic, industrial, and social conditions.

(3) Any advisory recommendation from the Department of Justice under section 1626.25.

(4) Any reply to the recommendation of the Department of Justice received from the registrant under section 1626.25.

1626.25 Special Provisions When Appeal Involves Claim That Registrant Is a Conscientious Objector.—(a) If an appeal involves the question whether or not a registrant is entitled to be sustained in his claim that he is a concientious objector, the appeal board shall tentatively determine whether or not the registrant is eligible for classification in a class lower than Class I-O or in Class I-O. If the appeal board finds that the registrant is eligible for classification in Class I-O or in a lower class, it shall place him in the appropriate class.

(b) If the appeal board tentatively determines that the registrant is not entitled to classification in either a class lower than Class I-O or in Class I-O, it shall transmit the entire file to the United States Attorney for the Federal judicial district in which the appeal board has jurisdiction

for the purpose of securing an advisory recommendation from the Department of Justice.

(c) No registrant's file shall be forwarded to the United States Attorney by any appeal board unless the record on the Classification Questionnaire (SSS Form No. 100) shows and the letter of transmittal states that the appeal board reviewed the file and tentatively determined that the registrant should not be classified in Class I-O or in a lower class. Any file forwarded to the United States Attorney without the information required by this paragraph shall be returned to the appeal board.

(d) Whenever a registrant's file is forwarded to the United States Attorney in accordance with paragraphs (b) and (c) of this section, the Department of Justice shall thereupon make an inquiry and hold a hearing on the character and good faith of the conscientious objections of the registrant. The registrant shall be notified of the time and place of such hearing and shall have an opportunity to be heard. If the objections of the registrant are found to be sustained, the Department of Justice shall recommend to the appeal board (1) that if the registrant is inducted into the armed forces, he shall be assigned to noncombatant service, or (2) that if the registrant is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of induction be ordered by his local board to perform for a period of twenty-four consecutive months civilian work contributing to the maintenance of the national health, safety, or interest. If the Department of Justice finds that the objections of the registrant are not sustained, it shall recommend to the appeal board that such objections be not sustained.

(e) Upon receipt of the recommendation of the Department of Justice, the appeal board shall mail a copy thereof to the registrant together with a letter advising the registrant that, within thirty days after the date of such mailing, he may file with the appeal board a written reply concerning the recommendation of the Department of Justice. Upon receipt of the reply of the registrant or the expiration of the period afforded him to make such reply, whichever occurs first, the appeal board shall determine the classification of the registrant, and in its determination it shall give consideration to, but shall not be found to follow, the recommendation of the Department of Justice. The appeal board also shall give consideration to any reply to such recommendation received from the registrant. The appeal board shall place in the Cover Sheet (SSS Form No. 101) of the registrant the recommendation of the Department of Justice, a copy of its letter transmitting a copy of such recommendation to the registrant, and any reply to such recommendation received from the registrant.

1627.1 Who May Appeal to the President From Any Determination of an Appeal Board.—(a) When either the State Directors of Selective Service or the Director of Selective Service deems it to be in the national interest or necessary to avoid an injustice, he may appeal to the President from any determination of an appeal board. He may take such an appeal at any time.

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No. 317

In the Supreme Court of the United States

OCTOBER TERM, 1968

AMERICO DI PIETTO, ERNEST INFELICE, JAMES MIRRO, FRANK SANTUCCI and ROBERT J. McDONNELL,
Petitioners,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

JOINT PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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In the
Supreme Court of the United States

OCTOBER TERM, 1968

No.

AMERICO DI PIETTO, ERNEST INFELICE, JAMES MIRRO, FRANK SANTUCCI and ROBERT J. McDONNELL,
Petitioners,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

JOINT PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To The Honorable The Chief Justice and Associate Justices of the Supreme Court of the United States:

The Petitioners, Americo Di Pietto, Ernest Infelice, James Mirro, Frank Santucci, Robert J. McDonnell, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit affirming the judgment of conviction for conspiracy to violate Title 18, U.S.C. §2314, in the United States District Court for the Northern District of Illinois, Eastern Division.

OPINION BELOW

The opinion of the Court of Appeals is not yet officially reported. It is printed in the Appendix to this Petition. (App. A, p. App. 1).

JURISDICTION

Judgment of the Court of Appeals was entered on May 17, 1968 (App. B, p. App. 13). A timely petition for rehearing was denied on June 20, 1968 (App. C, p. App. 14). The jurisdiction of this Court is invoked under 28 U.S.C., §1254(1).

STATUTE INVOLVED

18 U.S.C. §2314:

> Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; or
>
> Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities, knowing the same to have been falsely made, forged, altered, or counterfeited; or
>
> Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce, any tool, implement, or thing used or fitted to be used in falsely making, forging, altering, or counterfeiting any security, or any part thereof—
>
> Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.
>
> This section shall not apply to any falsely made, forged, altered, counterfeited or spurious representa-

tion of an obligation or other security of the United States, or of an obligation, bond, certificate, security, treasury note, bill, promise to pay or bank note issued by any foreign government or by a bank or corporation of any foreign country. June 25, 1948, c. 645, 62 Stat. 806, amended May 24, 1949, c. 139, §45, 63 Stat. 96.

QUESTIONS PRESENTED

1. Is the insertion of the payee and amount on an American Express money order validly signed by the payor a forgery so as to permit prosecution for conspiracy to transport falsely made, forged, altered or counterfeit securities in interstate commerce in violation of 18 U.S.C. §2314?

2. Do communications, concerning deliberations, between court attendants and the jury outside of the presence of the petitioners and their counsel require reversal when there has been no showing that the communications were not prejudicial?

3. Whether under the rule of this Court in *Bruton* v. *United States,* 88 S.Ct. 1620, repeated prejudicial and inflammatory comments and questions by the prosecutor can be cured by instructions to the jury to disregard.

STATEMENT OF THE CASE

These petitioners were indicted for conspiracy to transport falsely made, forged, altered or counterfeit securities in interstate commerce in violation of 18 U.S.C. §2314.

Viewed in a light most favorable to the Government, as it must be, *Glasser* v. *United States,* 315 U.S. 60, 80, the evidence established the following: In May of 1961 the petitioner Santucci stole 148 American Express money orders from a store where they were held for sale to customers. The money orders bore an imprinted signature on behalf of the American Express Company, and no additional signature was required on issuance. The words "not payable for more than one hundred dollars" were printed on them. The spaces for the amount, payee, date and sender's name and address were blank. The money orders were payable in New York. (App. D, p. App. 15).

On May 29th in Franklin Park, Illinois, the petitioners DiPietto and Infelice, after a meeting with the petitioner Santucci, arranged with the unindicted co-conspirator Ackerman to pass the money orders. The petitioners Santucci and Mirro were subsequently advised of this arrangement. (R. 36-51)[1] On June 1st, Ackerman asked the petitioner McDonnell for suggestions on the disposition of these money orders. The petitioner McDonnell then telephoned the unindicted co-conspirator O'Connor in Kansas City. O'Connor agreed to handle the money orders. (R. 47).

Ackerman delivered the money orders to O'Connor in St. Louis. O'Connor took them to Kansas City where he, unindicted co-conspirator Lent, and Lent's wife filled in about 85 of the money orders. Mrs. Lent filled in the sender's name as W. R. Stanley of Chicago and made them

---

[1] References to (R.) are to the appendix prepared for the court below and certified to this court as the record in the cause pursuant to rule.

payable to Henry L. Stanley. Lent typed in the amount of $100 on each order while O'Connor used a copying machine and Lent's draft cards, discharge papers, etc., to make out false identity papers in the name of Henry L. Stanley. (R. 162).

Lent went to Springfield, Missouri, where he cashed several of the money orders before being arrested. After his arrest Lent called O'Connor and hold him what had happened. O'Connor fled to Chicago and Michigan City, Indiana. The remaining money orders were returned to Di Pietto. (R. 163).

During the trial of the case, the prosecutor made prejudicial comments and asked prejudicial questions which the court instructed the jury to disregard.

The first instance occurred during the course of the trial when the prosecution elicited from the testimony of the witness Frederick Ackerman that he and the petitioner Mirro had taken an automobile ride along the Tri-State Highway subsequent to the alleged transportation of the money orders, and the petitioner Mirro supposedly pointed out to Ackerman a farm on the left of the road and stated: "That's Jack McGurn's private cemetery. That's is where he used to bury all the guys he hit. That's where Q'Connor ought to get buried." (R. 69)

"Mr. Calihan: Objection.

* * *

"The Court: Objection sustained, and the jury will disregard it.

"Mr. Calihan: I move for a mistrial.

"Mr. Berg: I move for a mistrial.

"The Court: Lie detector tests are not admissible in evidence in this jurisdiction and the jury will disregard the question.

"Mr. Schippers: I apologize, your Honor. I have no further questions." (R. 222)

Again during the cross-examination of the defense witness Kalady who was in the witness quarters with Ackerman and who was cooperating with state and government agents, Mr. McDonnell was examining Kalady as follows:

"Q. Mr. Kalady, as a matter of fact, you fully expect and have been told that you will be a government witness in other cases, haven't you?

"Mr. Betar: I object.

"Mr. Schippers: I object. *Not any more.*

"The Court: The objection is sustained.

"Mr. Calihan: I object to Mr. Schippers' remark and I move for a mistrial on the basis of it.

"The Court: I didn't hear what he said. What did he say?

"Mr. Bailey: Same motion.

"Mr. Calihan: He said 'Not any more.' I move for a mistrial on the basis of that remark.

"Mr. Bailey: Same motion.

"The Court: Overruled. The jury will disregard Mr. Schippers' comment. It has no bearing on this case and you will disregard it completely."

This testimony was objected to, and the Court overruled the motion for mistrial and struck the testimony relating to McGurn and instructed the jury to disregard it. (R. 77). Despite the fact that the Court had stricken this testimony, in closing argument, the prosecution used the word "buried" and raised an objection from all counsel. After the Court ruled in favor of the defendants, he stated in argument to the jury; "The word was 'buried', ladies and gentlemen, they still don't like it. They are still objecting to it." The Court thereupon ordered the jury to disregard the comment of the prosecution. Immediately, however, upon the heels of that admonition,

the prosecutor then stated, "Now, these defendants, these defendants here, who are so shocked about Ackerman's past life again have no qualms about talking about burying someone." (R. 283).

An agent of the FBI had testified on direct examination concerning his conversations with petitioner McDonnell. On cross-examination the petitioner McDonnell had offered to take a "lie-detector" test on his denial of the charges later made by this indictment. On re-direct examination the prosecutor asked, as follows:

> "Q. Oh, were the money orders run for fingerprints through the FBI laboratory in Washington?
>
> "A. They definitely were.
>
> "Q. What were the results?
>
> "A. No latent fingerprints of any value were developed.
>
> "Q. And Mr. McDonnell wasn't given a lie test because they don't mean anything, isn't that right?
>
> "Mr. Schippers: Your Honor, I apologize for the comment." (R. 252) (Emphasis supplied)

The jury began its deliberation at 3:35 P.M. on May 9, 1966. They were taken to sleeping quarters at 10:45 P.M. and resumed deliberations at 8:45 A.M. on May 10, 1966. Later in the morning, the jury communicated with the Judge through the marshal that they were unable to agree upon a verdict. At this time the Court called the jury into court and inquired whether further deliberations would be productive of a verdict. The foreman replied, "Well, we were unable to reach a decision, sir." At this time over the objection of counsel for the petitioners, the Court instructed the jury as follows:

> "Any verdict you reach must be unanimous and in your deliberation you should examine the evidence

submitted with a proper regard and consideration for the opinions of each other. You should listen to each other's arguments with an open mind."

"Now with reference to this instruction that I have just read, I am going to give you this following instruction and send you back for additional deliberation:

"The Court, by repeating this last instruction, does not intend nor mean to convey the impression that the jury must reach a decision in this case. You are at liberty not to do so if, after further discussion, any differences of opinion heretofore expressed cannot conscientiously be reconciled one way or the other."

The Judge then informed counsel and the petitioners that he would be attending the Judicial Conference for the Seventh Circuit and that he intended to keep the jury out until 4:30 P.M. At 4:00 that afternoon the Court resumed to take the verdict. At that time the Court stated:

"I would like the record to show that at appproximately 11:35 the jury sent the following note to the Court:

"'Your Honor: The issue has broken up and discussed and we the jury is still unable to reach a decision. The jury.'

"The deputy marshal, Mr. Joneson, phoned me at the conferences of judges and I directed him to just tell the jury to continue their deliberations. We will file that of record. All right."

There was no evidence introduced nor no hearing held to determine exactly what the deputy marshal had said to the jury when he conveyed the Judge's instructions to them. The Court of Appeals held this procedure not to be error.

REASONS FOR GRANTING THE WRIT

1. The opinion of the Court below in holding that the insertion of the name of a payee and the amount on an otherwise valid money order constitutes a forgery within the meaning of 18 U.S.C. §2314 is in direct conflict with the Court of Appeals for the Eighth Circuit, *Streett* v. *United States,* 321 F.2d 151, and appears to be in conflict with the reasoning of this Court in *Prussian* v. *United States,* 282 U.S. 675.

In *Streett* v. *United States,* 321 F.2d 151, the defendant was indicted under Section 2314 for the interstate transportation of a National City Bank travelers check which he had stolen. The counter-signature of the purchaser was written by the defendant, and he cashed the check. The Court of Appeals reversed the conviction because such a counter-signature is in the nature of an endorsement on the instrument and cannot be "the making" of the instrument itself. In so holding, the Eighth Circuit placed reliance on this Court's decision in *Prussian* v. *United States,* 282 U.S. 675. In *Prussian,* the indictment was for forgery of a government obligation in a forged endorsement situation. In holding that a forging endorsement was not a forgery within the meaning of the statute, this Court held:

> "But to extend the meaning of that phrase [obligation of the United States] so as to embrace the endorsement on the government draft is to enlarge the statutory definition, and would be possible only by a strained construction inadmissible in the interpretation of the criminal statutes, which must be strictly construed." *Prussian* v. *United States,* 282 U.S. 675, 677.

A close analysis of the money orders admitted into evidence herein (App. D, *infra*) will reveal that they are not "falsely made." There is no question that forgery within the meaning of the statute must consist in the false-making of the instrument and not in the making of any false representation thereon. *Martenay* v. *United States*, 216 F.2d 760 (10th Cir. 1954); *Melvin* v. *United States*, 316 F.2d 647 (7th Cir. 1963); *United States* v. *Gallagher*, 94 F.Supp. 640 (W.D. Pa. 1950); *United States* v. *Greever*, 116 F.Supp. 755 (D.C. D.C. 1953); *Wright* v. *United States*, 172 F.2d 310 (10th Cir. 1949); *Greathouse* v. *United States*, 170 F.2d 512 (4th Cir. 1948); *United States* v. *Brown*, 246 F.2d 541 (2d Cir. 1957); *United States* v. *Doran*, 299 F.2d 511 (7th Cir. 1962); *Gilbert* v. *United States*, 370 U.S. 650; *United States* v. *Carabasi*, 292 F.2d 362 (3d Cir. 1961).

The signature of the sender on an American Express Money Order is not comparable to the signature of a maker on a check because there is no reliance by any subsequent holder upon the credit of such a sender. The sender, as sender, assumes no obligations upon the instrument and his name on the face thereof is in the nature of a mere representation rather than the assumption of any obligation; consequently, the falseness of this signature, whether it be that of someone else or of a fictitious, non-existent person, cannot serve to being the case within the statute. A review of the decisions under Section 2314 in cases involving money orders will reenforce this conclusion. In *United States* v. *Nelson*, 273 F.2d 459 (7th Cir. 1963), a case which involved American Express Money Orders, this court wrote an extensive review of law of Federal forgery, concluding that the forged signature of a sub-agent of an American Express Company, ". . . without which the money orders could not have been cashed . . ."

brought the case within the statute. There was evidence in the *Nelson* case that the particular signature of the sub-agent was not on the money orders when they were stolen in blank and was placed thereon by a co-defendant. To the same effect is *United States* v. *Garfinkel,* 285 F.2d 548 (7th Cir. 1961), where the court in ruling on this issue stated:

> "But the name of the authorized sub-agent of American Express Company was forged. . . ." 285 F.2d 548, 551.

Since the decision of each of these cases, the American Express Company has apparently changed its money order form and the instruments involved in the instant case do not require the signature of, or validation by, any authorized sub-agent (App. D, *infra*). There is no place provided on the form for such a signature and American Express Company becomes obligated on the instrument by the signature of the treasurer thereof which is printed on the form. The change in the money order form then has the legal effect of increasing the negotiability of the document.

We note that there has been another more recent change in the form of money orders issued by the American Express Company since 1961, the date of transactions alleged in the indictment. (R. 192-5). The form the company now uses again requires validation by a sub-agent at the time of issuance. (R. 194). In this respect the present form is similar to that involved in *United States* v. *Nelson,* 273 F.2d 459 (7th Cir. 1963). We invite the attention of the court to *Cloud* v. *United States,* 361 F.2d 627 (8th Cir. 1966). The Court of Appeals for the Eighth Circuit, the same circuit in which the *Streett* case arose, affirmed a conviction in a case involving the theft of blank American

Express money orders from a grocery chain. The basis of that decision was the proof in the record in that case that a validating stamp was required to give the instrument currency. The evidence there established that the "AECO" stamp had been forged and that defendant knew that such a forgery of the "required symbol" was necessary to pass the instrument. 361 F.2d 627, 629. There is no such proof in this case. Indeed, the evidence is precisely contrary. (R. 193). The *Cloud* case, then, is entirely consistent with both *Streett* and *Nelson* and embodies the precise theory upon which we ask this court to reverse here.

The same rationale provides the basis of the decisions in two other cases involving Western Union Money Orders. In *Halfen* v. *United States,* 321 F.2d 556 (5th Cir. 1963), the forged signature of an employee of a hotel, which served as issuing agent, brought the case within the statute; and in the second case, *Halfen* v. *United States,* 324 F.2d 52 (10th Cir. 1963), there was a forged countersignature of a Western Union agent. In *United States* v. *Klein,* 340 F.2d 547 (2nd Cir. 1965), the necessary countersignature of a representative of the Bank of America, issuing Agent, was forged. On the other hand, is an earlier case, also denominated *United States* v. *Klein,* but found in 306 F.2d 13 (2d Cir. 1962), where the instruments involved were American Express Travelers Checks the government did not proceed under the portion of the statute involving forged securities but rather the prosecution was based upon the portion of the statute proscribing stolen merchandise of a value of more than five thousand dollars. Consequently, the government in that case avoided the problems presented in *Streett* v. *United States,* 331 F.2d 151 (8th Cir. 1964), the precise problem that the govern-

ment has not avoided in the case at bar. In every case we have found in which a conviction under the portion of the statute here involved has been affirmed, there has been a forgery of the critical portion of the face of the instrument necessary to give the instrument currency and constitute it a viable negotiable instrument. This is not true of the instant case because that critical portion of the face of the instrument was in final form when the money orders were obtained by the defendants. There instruments were not similar to stolen check forms such as were involved in *Stinson* v. *United States,* 316 F.2d 554 (5th Cir. 1963), where the signature of the maker was lacking. These money orders were like checks signed in blank; and once the valid, true signature of the maker was placed thereon and the maker's obligation assumed, there could be no forgery of the instrument or of the security. There could be only fraudulent negotiation and forged endorsements which, we have noted, are not within the statute. As the Supreme Court stated in *Gilbert* v. *United States,* 370 U.S. 650, 658:

> "Of course Congress could broaden the concept of 'Federal' forgery by statutory definition. We hold only that it has only yet done so."

We contend that the basic approach to the determination of whether or not a forgery here occurred must rest upon an analysis related to the reliance placed upon the credit of American Express Company, the maker of the instruments. The addition of secondary obligors can only be by endorsement and any statements or descriptions of the original transactions can only be representations. Endorsements and representatives, however false, do not obligate the American Express Company. That company must be obligated by the signature of its own representative duly authorized to extend its credit. In this case,

while the endorsements and the representations may have been false and the instruments themselves may have been stolen, the credit of the primary obligor, American Express Company, by its own choice was pledged by the signature already on the document.

This analysis accords with the decisions in most of the cases under the statute. *Greathouse* v. *United States,* 170 F.2d 512 (4th Cir. 1948), held that a check returned for insufficient funds, however knowingly drawn, was not a forged security within the statutes. *Wright* v. *United States,* 172 F.2d 310 (10th Cir. 1949), drew the same conclusion on a NSF check drawn on an out-of-state bank. *United States* v. *Greever,* 116 F.Supp. 755 (D.C. 1953) extended this rationale to a fictitious name check, when the individual who used the fictitious name was actually known by that name in some quarters. *United States* v. *Gallagher,* 94 F.Supp. 640 (W.D. Pa. 1950), found no violation in connection with a check on which the bank was real and the name was real and only the account non-existent. *Hubsch* v. *United States,* 256 F.2d 820, (5th Cir. 1958), is another case involving a fictitious name signed as a maker of a check. The Court reversed because it was not clear that the name was relied upon in extending credit on the instrument. In short, if the credit extended on the original obligation has been extended as a result of a false and fraudulent signature of the primary obligor on the instrument, there can be a forgery, otherwise not. The primary obligor on these instruments is the American Express Company. It promised to pay on the instruments by the signature of its treasurer and by its own choice the company required no counter-signature and no further validation at the time of issuance; consequently, there can be no forgery.

The Court below, however, held that the insertion of the name of the payee and the amount on the face of the valid money order constituted forgery. We submit that because of the conflict between the circuits and to resolve this important question in the administration of federal criminal justice that this Court should grant this Writ of Certiorari.

2. As found by the Court of Appeals in its decision (App. A, *infra*), the jury began its deliberation at 3:35 P.M. on May 9, 1966. They were taken to sleeping quarters at 10:45 P.M. and resumed deliberations at 8:45 A.M. on May 10, 1966. Later in the morning, the jury communicated with the Judge through the marshal that they were unable to agree upon a verdict. At this time the Court called the jury into court and inquired whether further deliberations would be productive of a verdict. The foreman replied, "Well, we were unable to reach a decision, sir." At this time over the objection of counsel for the petitioners, the Court for the *second* time instructed the jury as follows:

> "Any verdict you reach must be unanimous and in your deliberation you should examine the evidence submitted with a proper regard and consideration for the opinions of each other. You should listen to each other's arguments with an open mind."
>
> "Now with reference to this instruction that I have just read, I am going to give you this following instruction and send you back for additional deliberation:
>
> "The Court, by repeating this last instruction, does not intend nor mean to convey the impression that the jury must reach a decision in this case. You are at liberty not to do so if, after further discussion, any differences of opinion heretofore expressed cannot conscientiously be reconciled one way or the other." (R. 333)

The Judge then informed counsel and the petitioners that he would be attending the Judicial Conference for the Seventh Circuit and that he intended to keep the jury out until 4:30 P.M. At 4:00 that afternoon the Court resumed to take the verdict after approximately 14 hours of deliberation. At that time the Court stated:

> "I would like the record to show that at approximately 11:35 the jury sent the following note to the Court:
>
> "'Your Honor: The issue has broken up and discussed and we the jury is still unable to reach a decision. The jury.'
>
> "The deputy marshal, Mr. Joneson, phoned me at the conferences of judges and I directed him to just tell the jury to continue their deliberations. We will file that of record. All right." (R. 336)

There was no evidence introduced nor no hearing held to determine exactly what the deputy marshal had said to the jury when he conveyed the Judge's instructions to them. The Court of Appeals held this procedure not to be error.

We submit that this decision of the Court of Appeals is in conflict with *Shields* v. *United States,* 273 U.S. 583. There the Court with no requirement as to prejudice reversed a federal criminal conviction before the trial judge who violated the right of defendant and counsel to be present when the trial judge answered inquiries from the jury. We further submit that the decision of the Court of Appeals is in direct conflict with the decision of the Third Circuit, *Arrington* v. *Robertson,* 114 F. 2d 821; *United States* v. *Neal,* 320 F.2d 533, the Sixth Circuit in *Evans* v. *United States,* 284 F.2d 393 and the Tenth Circuit in *Fina* v. *United States,* 46 F.2d 643. We respectfully sub-

mit since a defendant has a constitutional right to be present during the entire trial that no prejudice need be shown when communications are made to the jury by a third person outside the presence of the court and the petitioners. *United States* v. *Behrens,* 375 U.S. 162. We also submit that under the procedure below, the prosecution did not satisfy its "heavy burden", *Miranda* v. *Arizona,* 384 U.S. 436, that the constitutional rights of these defendants were not violated. This question was presented to this Court in *Grosso* v. *United States,* 390 U.S. 62. However, because of the disposition of other issues in that case, this Court did not rule upon this issue. We submit that this question is now again ripe for review.

3. This case presents the question left unresolved in *Bruton* v. *United States,* 88 S. Ct. 1620, No. 705, October Term, 1967, as to the effect of instructions to disregard repeated prejudicial comments and actions by the prosecutor. In *Bruton,* this Court in overruling *Delli Paoli* v. *United States,* 352 U.S. 232, held that a defendant was prejudiced by the admission of a co-defendant's statement incriminatory of both defendants in spite of careful instruction by the trial court that the jury was to consider the statement only against the person making it. We submit that this case presents an opportunity for the court to enunciate a rule concerning the application of *Bruton* to cases involving repeated prejudicial comments and questions by the prosecution. In *Bruton* this Court stated:

> "Not every admission of inadmissible hearsay or other evidence can be considered to be reversible error unavoidable through limiting instructions; instances occur in almost every trial where inadmissible evidence creeps in, usually inadvertently."

The prejudicial questions and comments by the prosecution in this case did not creep in inadvertently but rather seemed to crash into the case through deliberate design.

The first instance occurred during the course of the trial when the prosecution elicited from the testimony of the witness Frederick Ackerman that he and the petitioner Mirro had taken an automobile ride along the Tri-State Highway subsequent to the alleged transportation of the money orders, and the petitioner Mirro supposedly pointed out to Ackerman a farm on the left of the road and stated: "That's Jack McGurn's private cemetery. That's is where he used to bury all the guys he hit. That's where O'Connor ought to get buried." (R. 69)

This testimony was objected to, and the Court overruled the motion for mistrial and struck the testimony relating to McGurn and instructed the jury to disregard it. (R. 77). Despite the fact that the Court had stricken this testimony, in closing argument, the prosecution used the word "buried" and raised an objection from all counsel. After the Court ruled in favor of the defendants, he stated in argument to the jury; "The word was 'buried', ladies and gentlemen, they still don't like it. They are still objecting to it." The Court thereupon ordered the jury to disregard the comment of the prosecution. Immediately, however, upon the heels of that admonition, the prosecutor then stated, "Now these defendants, these defendants here, who are so shocked about Ackerman's past life again have no qualms about talking about burying someone." (R. 283).

If this were the only instance of improper conduct by the prosecutors it would be bad enough. However, prejudice injected by the prosecution did not stop there. An agent of the FBI had testified on direct examination con-

cerning his conversations with petitioner McDonnell. On cross-examination the petitioner McDonnell had offered to take a "lie detector" test on his denial of the charges later made by this indictment. On re-direct examination the prosecutor asked, as follows:

"Q. Oh, were the money orders run for fingerprints through the FBI laboratory in Washington?

"A. They definitely were.

"Q. What were the results?

"A. No latent fingerprints of any value were developed.

"Q. And Mr. McDonnell wasn't given a lie test because they don't mean anything, isn't that right?

"Mr. Calihan: Objection.

* * *

"The Court: Objection sustained, and the jury will disregard it.

"Mr. Calihan: I move for a mistrial.

"Mr. Berg: I move for a mistrial.

"The Court: Lie detector tests are not admissible in evidence in this jurisdiction, and the jury will disregard the question.

"Mr. Schippers: I apologize, your Honor. I have no further questions." (R. 222)

Again during the cross-examination of the defense witness Kalady who was in the witness quarters with Ackerman and who was cooperating with state and government agents, Mr. McDonnell was examining Kalady as follows:

"Q. Mr. Kalady, as a matter of fact, you fully expect and have been told that you will be a government witness in other cases, haven't you?

"Mr. Betar: I object.

"Mr. Schippers: I object. *Not any more.*

"The Court: The objection is sustained.

"Mr. Calihan: I object to Mr. Schippers' remark and I move for a mistrial on the basis of it.

"The Court: I didn't hear what he said. What did he say?

"Mr. Bailey: Same motion.

"Mr. Calihan: He said 'Not any more.' I move for a mistrial on the basis of that remark.

"Mr. Bailey: Same motion.

"The Court: Overruled. The jury will disregard Mr. Schippers' comment. It has no bearing on this case and you will disregard it completely.

"Mr. Schippers: Your Honor, I apologize for the comment." (R. 252) (Emphasis supplied)

The significance of "not any more" is enormous. Kalady had testified that Ackerman had only recently advised him of the advantages of being a government witness. Kalady testified that under Ackerman's prompting in April, 1966, he had lied to the FBI about being a witness to a murder. Ackerman had previously testified that he was going to start telling the truth beginning in October of 1965 (R. 116, 120). Thus a conflict arose by Kalady's testimony. The disavowal of Kalady as a government witness constituted a highly improper comment by the prosecutor on the credibility of the defense witness — a matter solely within the province of the jury.

The entire case as it related to these petitioners, rested solely upon the testimony of the witness Ackerman. Ackerman had been licensed to practice law in Illinois but had withdrawn his name from the roll of attorneys immediately before he was indicted and was a convicted felon. (R. 34). He admitted that he had not paid income taxes since 1956 or 57 and at the present time owed the government back income taxes in the amount of $400,000 (R. 90). He stated that since he had left law school he had been known by at least five different names (R. 79-80). He had been

involved in a fraudulent scheme to bilk American investors of worthless mines in Canada (R. 83-84), and that even though he had money he failed to make support payments to his wife and seven children which resulted in the loss of their home (R. 88, 225-230). He admitted that he had falsified an application for a Federal Housing Authority loan knowing that it was a federal offense to do such (R. 92). He also admitted that he had been the subject of contempt proceedings in the Probate Court of Cook County (R. 109-110).

Thus, we submit that in a case such as this where the conviction of the petitioners rests upon such a slender reed that the rule of *Bruton* should apply to prejudice engendered in the trial by the United States Attorney. As this Court recognized in *Bruton,* Judge Learned Hand viewed limiting instructions as a "placebo", medically defined as "a medicinal lie." *Bruton* v. *United States,* 88 S. Ct. 1620, fn. 8.

We therefore submit that in view of the matters left open by this Court's decision in *Bruton,* that the Court issue its Writ of Certiorari in order to determine the applicability of the *Bruton* rule to such cases.

CONCLUSION

Wherefore, for the foregoing reasons, Petitioners pray that a Writ of Certiorari be issued to the United States Court of Appeals for the Seventh Circuit, in this case.

Respectfully submitted,

EDWARD J. CALIHAN, JR.
JOHN P. CROWLEY
BAILEY & LE FEVOUR
Attorneys for Petitioners

APPENDIX

APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

September Term, 1967 — September Session

Nos. 15857, 15858, 15859, 15860, 15861 and 16038
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
AMERICO DI PIETTO, *et al.*,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

May 17, 1968

Before SCHNACKENBERG, FAIRCHILD and CUMMINGS, *Circuit Judges.*

FAIRCHILD, *Circuit Judge.* This is an appeal from the conviction of five defendants of conspiring to transport falsely made, forged, altered or counterfeited securities in interstate commerce.[1]

[1] 18 U.S.C. §2314.

The evidence tended to show the following facts: In May 1961, defendant Santucci stole 148 American Express money orders from a store where they were held for sale to customers. The money orders bore an imprinted signature on behalf of American Express Co., and no additional signature was required on issuance. The words "Not payable for more than one hundred dollars" were printed on them. The spaces for amount, payee, date, and sender's name and address were blank. The money orders were payable at New York.

On May 29, in Franklin Park, Illinois, defendants Di Pietto and Infelice (with the consent and knowledge of Santucci and defendant Mirro) arranged with unindicted co-conspirator Ackerman to pass the money orders. On June 1, Ackerman enlisted the aid of defendant McDonnell, who suggested and later telephoned unindicted co-conspirator O'Connor in Kansas City. O'Connor agreed to handle the money orders.

Ackerman delivered the money orders to O'Connor in St. Louis. O'Connor took them to Kansas City where he, unindicted co-conspirator Lent, and Lent's wife filled in about 85 of the money orders. Mrs. Lent filled in the sender's name as W. R. Stanley of Chicago and made them payable to Henry L. Stanley. Lent typed in the amount of $100 on each order while O'Connor used a copying machine and Lent's draft cards, discharge papers, etc., to make out false identity papers in the name of Henry L. Stanley.

Lent went to Springfield, Missouri, where he cashed several of the money orders before being arrested. After his arrest Lent called O'Connor and told him what had happened. O'Connor fled to Chicago and Michigan City,

Indiana, and was in contact with some of defendants for a time. The remaining money orders were returned to Di Pietto.

The points raised by defendants and our conclusions concerning them are as follows:

I. *Were the money orders, when cashed, "falsely made, forged, altered, or counterfeited"?*

The third paragraph of 18 U.S.C. sec. 2314 prescribes punishment for one who "with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities . . . knowing the same to have been falsely made, forged, altered, or counterfeited. . . ."

The contemplated transportation in interstate commerce on which guilt of conspiracy is predicated is the transportation from the place where the money orders would be cashed to New York. In order to cash the money orders, the amount, name and address of sender, and name of payee would have to be, as they in fact were, falsely written on the face of the money orders and the purported endorsement of the payee on the back.

Defendants' first contention is that in this form the money orders were not falsely made, forged, altered, or counterfeited securities.

Defendants rely on *Streett* v. *U.S.*[2] In that case defendant stole some genuine travelers checks from the purchaser and named payee. The checks were completely filled out including the amount of the checks and the signature of the payee. All that was required for negotia-

[2] (8th Cir. 1964), 331 F.2d 151.

tion was countersignature of the payee. The defendant forged the payee's countersignature when he cashed the checks. The indictment charged defendant with transporting falsely made and forged securities in interstate commerce. The court held that because "the traveler's checks involved were complete genuine securities at the time that they came into the hands of the defendant,"[3] the forgery of the countersignature did not make the check a forged security.

With all respect, we question whether *Streett* is correct. A genuine traveler's check without the payee's countersignature is a security under 18 U.S.C. sec. 2311 (ff.). It has value to the payee, but no value, for legitimate use, to anyone else. When validly countersigned, it is still a security, but the obligation it represents now runs to someone other than the payee. In the light of the purpose of the statute, it seems at least a reasonable argument that if the countersignature, which, if genuine, alters the rights evidenced by the security, is a forgery, the check is a forged security for the purpose of 18 U.S.C. sec. 2314.[4]

We are aware that in *Streett;* the eighth circuit relied on *Prussian* v. *United States* (1931), 282 U.S. 675, 51 S.Ct. 223, 75 L.Ed. 610. The statutes involved in the two cases are different. Under a statute punishing forgery of an obligation of the United States, the Supreme Court held in *Prussian* that a forged endorsement by the purported payee of a governmental draft did not constitute forgery of the draft.

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[3] *Streett* v. *U.S.* (8th Cir. 1964), 331 F.2d 151, 157.

[4] For critical comment on *Streett,* see LaBuy, Manual on Jury Instructions—Criminal, sec. 24.02, 36 F.R.D. 457, 675.

But in any event *Streett* is distinguishable from the case before us. The traveler's checks in *Streett* were, at the time of theft, genuine written evidence of an obligation of American Express to pay a sum of money upon proper presentation of the check. In the case before us, although the signature was genuine, the money orders were not, at the time of theft, evidence of any obligation of American Express. They did not appear to evidence an obligation until the amount and the name of the payee were fraudulently inserted. Such insertions were forgery.[5]

II. *Was there prejudicial communication with the jury and was the verdict a product of coercion?*

The jury began deliberations at 3:35 p.m. May 9. They were taken to sleeping quarters at 10:45 p.m., and resumed deliberations at 8:45 a.m. May 10. At 9 a.m. the judge informed counsel in open court that the preceding evening the jury sent a written question as to who had made a telephone call referred to in the testimony. The judge said, "I told them I was unable to furnish any information, if I did at all, until the lawyers reconvened at 9:00 o'clock in the morning." After colloquy, the judge indicated to counsel he would not respond further to the jury's question.

Later in the morning court resumed and the judge announced that the foreman had sent word through the marshal that the jury "apparently are unable to agree at this time." After colloquy, the judge called the jury into court and inquired of the foreman "whether, in your judgment, further deliberation would be productive of a

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[5] *Castle* v. *United States* (5th Cir. 1961), 287 F.2d 657, 660; *United States* v. *Nelson* (7th Cir. 1960), 23 F.2d 459, 462; *Rowley* v. *United States* (8th Cir. 1951), 191 F.2d 949, 950. See 36 Am. Jur.2d 681, Forgery, sec. 1.

verdict." The foreman replied, "Well, we were unable to reach a decision, sir."

The judge then announced he would repeat an instruction given in the general charge and add another.

The repeated instruction was:

> "Any verdict you reach must be unanimous and in your deliberation you should examine the evidence submitted with a proper regard and consideration for the opinions of each other. You should listen to each other's arguments with an open mind."

After repeating the above, the judge said:

> "Now with reference to this instruction that I have just read, I am going to give you this following instruction and send you back for additional deliberation:
>
> "The Court, by repeating this last instruction, does not intend nor mean to convey the impression that the jury must reach a decision in this case. You are at liberty not to do so if, after further discussion, any differences of opinion heretofore expressed cannot conscientiously be reconciled one way or the other."

Defense counsel objected to the instructions and moved to discharge the jury.

The judge announced that he was going to the circuit judicial conference, but would be available and that he intended to keep the jury out until 4:30 p.m.

Court resumed at 4 p.m. to receive a verdict. The judge made the following announcement:

> "I would like the record to show that at approximately 11:35 the jury sent the following note to the Court:

"'Your Honor: The issue has broken up and discussion and we the jury is still unable to reach a decision. The jury.'

"The deputy marshal, Mr. Joneson, phoned me at the conferences of judges and I directed him to just tell the jury to continue their deliberations. We will file that of record. All right."

The jury was brought in and the foreman said it had reached a verdict. The verdict, finding defendants guilty, was read, and the jury polled.

Defendants challenge, as reversible error, the message sent by way of the deputy marshal to the jury "to continue their deliberations". We are convinced beyond a reasonable doubt that the communication of this message by way of the deputy marshal was harmless.[6]

Defendants also claim that the instructions given when the jury indicated inability to agree were coercive. We do not agree, and find no reason for deeming the verdict a product of coercion.

III. *Can Ackerman's testimony support the verdict?* Independent witnesses established the initial disappearance of the money orders, and the fact that two were cashed. Lent testified concerning the filling in and cashing. O'Connor did not testify. It is clear that Ackerman supplied the only evidence linking defendants with the theft and cashing.

The district judge properly gave wide latitude for cross-examination and impeachment of Ackerman. His past his-

---

[6] *United States* v. *Compagna* (2d Cir. 1944), 147 F.2d 524, 528; *United States* v. *Hoffa* (7th Cir. 1966), 367 F.2d 698, 713, judgment vacated 387 U.S. 231, 87 S.Ct. 1583, 18 L.Ed.2d 738.

tory is highly unsavory, and he admitted lies, crimes, frauds and the like, as well as difficulties with the law pending at the time of the trial. There is, however, nothing inherently incredible in his testimony concerning the relevant facts. If it is fabrication, he is indeed an unusual expert.

We do not think that the derogatory facts in the record destroyed his credibility as a matter of law.

IV. *Did prejudicial error occur at trial?*

Defendants allege that several occurrences combined to deprive them of a fair trial. We do not agree. The instances, and our comments, follow:

1. *Judge's interrogation of jury about newspaper articles.*

At the close of the first day of trial (May 3), the judge warned the jury that there might be comment on the trial in the public media, explained the unfairness which would result if such information influenced them, and directed them to avoid reading or listening to the public media concerning the case. He asked them to report promptly any unintentional violation, and said he would ask each juror each day whether he had followed the instruction. Each morning, he asked each juror, by name, and each juror answered he had not read or heard anything.

The May 4 morning payers carried two stories containing prejudicial material, and defense counsel brought them to the attention of the court. The judge inquired of each juror, as above related.

Defendants contend that the manner of questioning put so much pressure on each juror to answer that he had

not read anything that no reliance can be placed upon the answers.

We can not say from this record that the judge could not properly believe that the answers were truthful.

2. *References to "burying" O'Connor.*

It was charged and the evidence tended to show that the conspiracy to pass the money orders continued after the arrest of Lent. Ackerman testified that while several defendants were deciding what to do with O'Connor at that point, Mirro recommended "burying" O'Connor because he could put them in the penitentiary. Government counsel referred to this in argument. We agree with the government that the testimony was relevant in proving the continuing conspiracy, and that reference in argument was proper.

Ackerman also testified that on another occasion Mirro pointed out a farm and told him it had been Jack McGurn's private cemetery where he buried the guys he hit and that was the place where O'Connor ought to get buried. The court instructed the jury to disregard the conversation about the place where McGurn buried his hits, but denied a mistrial. We find no error.

3. *Reference by government counsel to lie detector test.*

Defendant McDonnell, an attorney, conducted his own defense. FBI Agent Stephan had interviewed him. On cross-examination, McDonnell asked Stephan if McDonnell had not asked to be given a lie detector test. A government objection was overruled and Stephan said McDonnell had asked, but Stephan had declined.

On redirect, the government asked: "And Mr. McDonnell wasn't given a lie test because they don't mean any-

thing, isn't that right?'' The court sustained an objection and instructed the jury to disregard the question. We find no error.

4. *Remark by government counsel.*

Ackerman and Joseph Kalady had been staying in protective custody at the Cook County ''witness quarters.'' Kalady had admitted telling a false story about being a witness to a killing. He was called by defendant Mirro and testified, in effect, that Ackerman had suggested that he tell such story to the authorities so that they might drop some of the charges against Kalady. Defendant McDonnell, on cross-examination, asked ''Mr. Kalady, as a matter of fact, you fully expect and have been told that you will be a government witness in other cases, haven't you?'' Government counsel said, ''I object. Not any more.'' On objection, the court instructed the jury to disregard the remark, but denied a mistrial.

The defense asserts that the ''disavowal of Kalady as a government witness constituted a highly improper comment by the prosecutor on the credibility of the defense witness. . ...'' The remark was unnecessary and irrelevant. In the light of Mr. Kalady's somewhat bizarre testimony, however, we conclude that under all the circumstances the remark can not have been prejudicial to defendants.

5. *Argument of counsel for Santucci.*

Santucci's counsel argued:

> ''Don't judge Frank Santucci because his name is Santucci. Don't judge him because he happens to know Mr. Infelice. Don't judge him because he is an Italian or you may suspect he is a crook or a hoodlum or member of the syndicate or a member of the mob.''

The other defendants claim that the reference to ethnic background, and to Infelice, deprived them of a fair trial. Infelice had taken the stand and admitted a felony conviction and that his occupation was that of professional gambler.

Santucci's counsel, of course, was suggesting facts which were irrelevant, and reasons for decision which would (as he was contending) be wholly improper. Nothing else in the record touched upon those areas, and we are not persuaded that these remarks induced the jury to consider such factors.

V. *Santucci's intent with respect to interstate transportation.*

The money orders were payable at New York and in defendants' possession in the Chicago area. Any plan to realize on them would necessarily include interstate transportation. When they were handed to Ackerman, the names and amount had not been inserted, and there had been no forgery. If they were transported to New York in that condition and the forgery perpetrated there, no interstate transportation of a forged security would have occurred.

Ackerman testified that Santucci was present when Ackerman agreed with Di Pietto to handle the money orders on a consignment basis. There was no testimony showing Santucci's knowledge of a selection of Springfield, Missouri or any other particular place in which to cash them.

Apparently the claim is that he must be presumed to have agreed only to a plan that they be transported to New York without alteration, and completed and cashed there. There was no evidence that Santucci placed or

knew of any restriction on where the money orders were to be cashed. We think that under the circumstances Santucci is chargeable with an agreement which included the natural and probable methods of achieving the agreed result.

The judgments will be affirmed.

A true Copy:
Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

UNITED STATES COURT OF APPEALS
for the Seventh Circuit
Chicago, Illinois 60604
Friday, May 17, 1968

Before

Hon. ELMER J. SCHNACKENBERG, Circuit Judge
Hon. THOMAS E. FAIRCHILD, Circuit Judge
Hon. WALTER J. CUMMINGS, Circuit Judge

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*	)	Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
Nos. 15857, 15858, 15859, 15860, 15861 and 16038	)	
v.	)	
AMERICO DI PIETTO, *et al.*, *Defendants-Appellants.*	)	

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgments of the said District Court in this cause appealed from be, and the same are hereby, AFFIRMED, in accordance with the opinion of this Court filed this day.

APPENDIX C

UNITED STATES COURT OF APPEALS
for the Seventh Circuit
Chicago, Illinois 60604
Thursday, June 20, 1968

Before

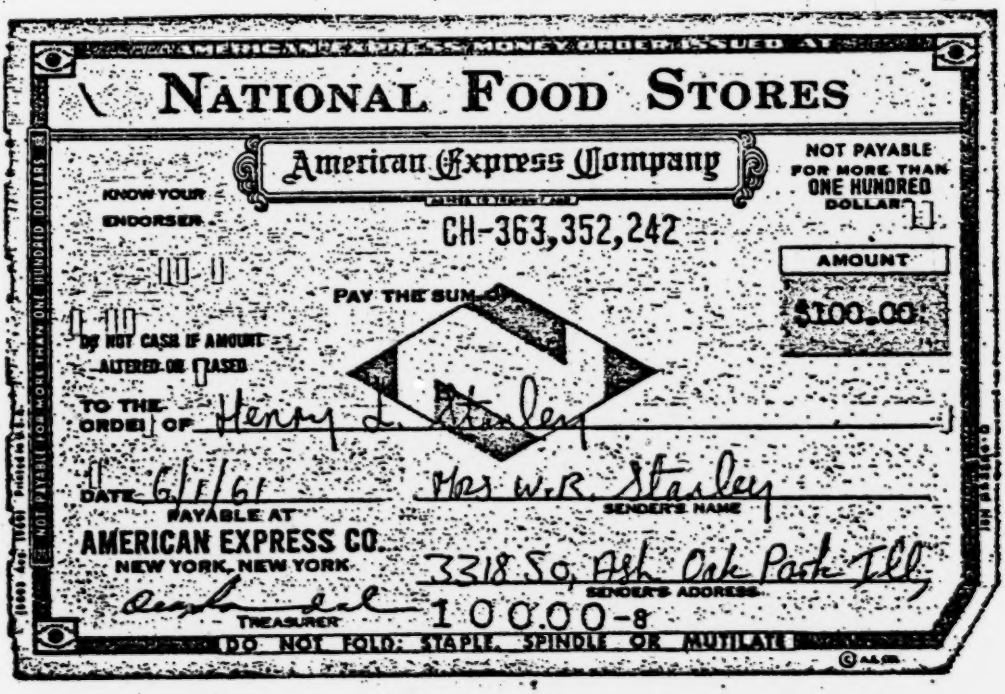
Hon. ELMER J. SCHNACKENBERG, Circuit Judge
Hon. THOMAS E. FAIRCHILD, Circuit Judge
Hon. WALTER J. CUMMINGS, Circuit Judge

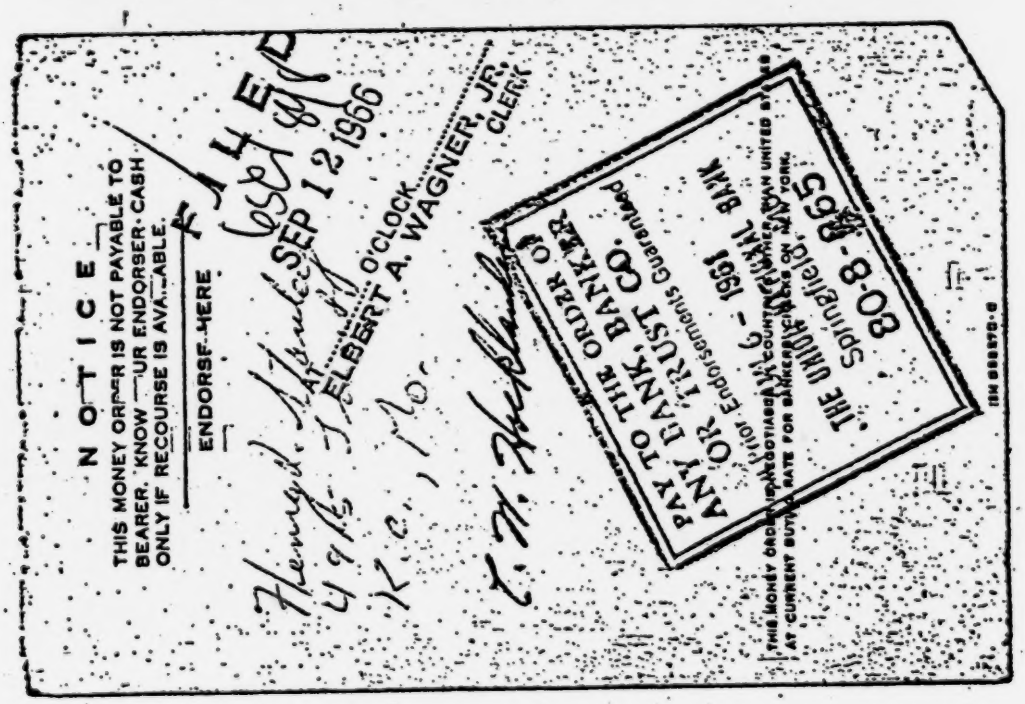
UNITED STATES OF AMERICA, *Plaintiff-Appellee,*	)	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
Nos. 15857, 15858, 15859, 15860, 15861 and 16038	)	
v.	)	
AMERICO DI PIETTO, *et al.*, *Defendants-Appellants.*	)	

It Is Ordered by the Court that the petition for rehearing filed in the above entitled cause be and the same is hereby denied.

APPENDIX D

SUPPLEMENTAL APPENDIX





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IN THE

Supreme Court of the United States

October Term, 1968

No. 474

CHARLES CACI, also known as Bobby Milano, STEPHEN A. CINO, PASQUALE A. NATARELLI, also known as Pat Natarelli, FREDERICO G. RANDACCIO and LOUIS SORGI,

Petitioners,

vs.

UNITED STATES OF AMERICA.

PETITION OF PASQUALE A. NATARELLI FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ANTHONY J. DeMARIE,
Attorney for Petitioner, Pasquale A. Natarelli,
610 Walbridge Building,
Buffalo, New York 14202.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

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IN THE

Supreme Court of the United States

October Term, 1968

No. .....

CHARLES CACI, also known as Bobby Milano, STEPHEN A. CINO, PASQUALE A. NATARELLI, also known as Pat Natarelli, FREDERICO G. RANDACCIO and LOUIS SORGI,

Petitioners,

vs.

UNITED STATES OF AMERICA.

PETITION OF PASQUALE A. NATARELLI FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petition of PASQUALE A. NATARELLI demonstrates to this Court that on July 30, 1968 the United States Circuit Court of Appeals for the Second Circuit affirmed a conviction had against this petitioner and codefendants after trial by jury in the United States District Court for the Western District of New York at Buffalo.

The petitioner was sentenced by the HONORABLE JOHN O. HENDERSON, District Court Judge, to a twenty years term of imprisonment on the first count, five years imprisonment on the second count; the sentences to be served concurrently.

Petitioner is now confined to the United States Penitentiary at Atlanta, Georgia.

Excerpts from the Opinion as it Pertains to Petitioner

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 511—September Term, 1967.
(Argued June 18, 1968 Decided July 30, 1968.)
Docket No. 32036

UNITED STATES OF AMERICA,

Appellee,

v.

CHARLES CACI, also known as Bobby Milano, STEPHEN A. CINO, PASQUALE A. NATARELLI, also known as Pat Natarelli, FREDERICO G. RANDACCIO and LOUIS SORGI,

Defendants-Appellants.

Before:

Moore and Hays, Circuit Judges, and Timbers, District Judge.*

Appeals from judgments of the United States District Court for the Western District of New York, John O. Henderson, Chief Judge, entered on a jury verdict convicting appellants of conspiring to commit a robbery which would affect commerce in violation of 18 U. S. C. § 1951 and conspiring to transport stolen goods in interstate commerce in violation of 18 U. S. C. §§ 371 and 2314.

Affirmed.

* Of the District Court for the District of Connecticut, sitting by designation.

Paul Ivan Birzon, Buffalo, New York, for Apellant Caci.

Peter L. Parrino, Buffalo, New York, for Appellant Cino.

Salten Rodenberg, Buffalo, New York, for Appellant Natarelli.

Frank G. Raichle, Buffalo, New York (Herald Price Fahringer, Buffalo, New York, on the brief), for Appellant Randaccio.

Joseph P. Runfola, Buffalo, New York, for Appellant Sorgi.

Andrew F. Phelan, Assistant United States Attorney (Thomas A. Kennelly, Acting United States Attorney for the Western District of New York, Thomas H. Henderson, Jr., and Gary L. Gardner, Attorneys, Department of Justice, on the brief), for Appellee.

HAYS, *Circuit Judge:*

Appellants Charles Caci, Stephen A. Cino, Pasquale A. Natarelli, Frederico G. Randaccio and Louis Sorgi, were convicted, upon a trial by jury, of conspiring to commit a robbery which would affect commerce in violation of 18 U. S. C. § 1951 and conspiring to transport stolen goods in interstate commerce in violation of 18 U. S. C. §§ 371 and 2314. We have considered the many assignments of error which have been advanced by appellants and have found no ground for reversal. The judgments of conviction are affirmed.

3288

The indictment charged in the first count that appellants conspired to rob an armored car messenger at a Los Angeles hotel in violation of 18 U. S. C. § 1951 and in the second count that appellants conspired in violation of 18 U. S. C. § 371 to transport in interstate commerce proceeds from the sale of jewelry which they planned to steal from a wealthy guest at the hotel. Neither of the planned rob-

beries was executed because the guest did not come to the hotel as expected. But for the decision of Pascal Calabrese, a co-conspirator, to "cooperate" while awaiting sentence on another charge, appellants' plans probably would never have come to the attention of law enforcement officials.

Calabrese, the chief government witness at trial, testified in great detail to the following. On December 29, 1964 Calabrese robbed the Buffalo City Hall of a substantial amount of money and immediately went in to hiding. A few days later Stephen Cino contacted him at a Buffalo motel and told him that "Pat" [Natarelli] and "Freddie" [Randaccio] wished to see him. A meeting was arranged for the following evening, February 5, at Natarelli's house. When Calabrese arrived at the house he found Cino and Natarelli already there. They told him that they had "a couple of good scores" for him out of town. About a half hour later Randaccio arrived, and Natarelli and Randaccio explained their plans in detail.

Calabrese was to go to Los Angeles where he would be met by Charles Caci, an entertainer who used the stage name of Bobby Milano. A couple of days later Cino would join them. Caci would introduce Calabrese to Louis Sorgi, who was in charge of security at the Beverly Hilton Hotel. Calabrese would commit two robberies at the hotel. He would rob Mrs. Walker McCune, a frequent guest at the hotel, of her jewelry which was reputed to be worth

$400,000. Then he would rob the armored car messenger who visited the hotel to pick up the daily receipts. The jewelry would be taken by Cino to his uncle in San Francisco, who would "fence" it, and the proceeds would be returned to Buffalo.

It was agreed that Calabrese would have some friends drive him to Pittsburgh where he would get a flight to Los Angeles. At the conclusion of the meeting Natarelli and Randaccio gave Calabrese several hundred dollars for expenses.

When Calabrese arrived at the airport in Los Angeles, Caci was there to meet him. While driving from the airport to Caci's apartment they passed the Beverly Hilton, which Caci identified as the site of the "scores." Caci obtained an apartment for Calabrese in the building in which he lived. A few days later, on February 10, Cino arrived. On that evening Caci, Cino and Calabrese went to Sorgi's home where they discussed plans for the robberies. The next day Sorgi took Calabrese on a tour of the Beverly Hilton. They visited the suite usually occupied by Mrs. McCune and made a careful study of the tunnel used by the armored car messenger. Calabrese then left the hotel with Caci and Cino and went over the planned escape route. When they reached Calabrese's apartment, Calabrese commented that it was amazing that Sorgi had the keys to the entire hotel. Caci displayed a key that he said would open all the doors Sorgi had opened at the hotel.

Mrs. McCune was expected to arrive at the hotel on the following day, but she did not. For the next several days Caci telephoned Sorgi frequently to determine whether Mrs. McCune had come. On February 17 Cino received a telephone call from Buffalo and told Calabrese that his, Calabrese's, connection with the City Hall robbery was

known to the police and that he, Cino, had been instructed to return to Buffalo lest he be found with Calabrese. Cino then left for Buffalo. Five days after Calabrese surrendered to the authorities in Buffalo.

Calabrese's testimony, only the highlights of which have been summarized here, was corroborated in many details by evidence as to hotel reservations, room rentals, and the like. Evidence that Beverly Hilton passkeys had been found in Caci's possession when he was arrested on another charge provided important support for Calabrese's story.

The government introduced evidence to show that the robbery of the messenger from Armored Transport, Inc. of the pouch containing cash and checks for delivery to the United California Bank would have affected commerce. Hotel records for February, 1965 revealed that fifty-nine percent of the checks cashed at the hotel were drawn on out of state banks. During the same period 1,150 American Express Travelers Checks were cashed at the hotel. Other evidence indicated that both the bank checks and the travelers checks moved in interstate commerce in the course of collection procedures.

* * *

3291

3. Effect on Interstate Commerce

Appellant Natarelli contends that the proof with respect to effect on interstate commerce was insufficient because it was limited to February, 1965 while the robbery of the messenger was not definitely scheduled for that month. However, the evidence clearly establishes that appellants intended to execute this robbery in February. The messenger was to be robbed shortly after the theft of Mrs. McCune's jewelry; Mrs. McCune was to be robbed shortly after she arrived at the hotel. And Mrs. McCune was expected to arrive on or before February 12.

* * *

3295

Natarelli claims that evidence that the robbery would obstruct the interstate movement of checks was inadmissible under *Stirone v. United States*, 361 U. S. 212 (1960), because the indictment charged only that the robbery would obstruct the interstate movement of [illegible]. The claim is frivolous.

3299

* * *

9. Other points

The remaining contentions do not require extended comment.

a. Natarelli's claim that the second count should have been dismissed because one cannot be guilty of conspiring to transport stolen goods "knowing them to have been stolen" under 18 U. S. C. § 2314 until the goods have in fact been stolen is without merit. *Cf. Williamson v. United States*, 207 U. S. 425, 446-47 (1908).

* * *

3302

The instruction that the defendants need not have intended to affect commerce in order to be guilty was entirely correct. See *Nick v. United States*, 122 F. 2d 660, 673 (8th Cir.), cert. denied, 314 U. S. 687 (1941), cited with approval in *United States v. Varlack*, 225 F. 2d 665, 672 (2d Cir. 1955). See also *United States v. Pranno*, 385 F. 2d 387, 389-90 (7th Cir. 1967), cert. denied, 390 U. S. 944 (1968).

Affirmed.

3303

Jurisdiction

Petitioner seeks review of a judgment of conviction returned against him in the District Court for the Western District of New York, affirmed by the United States Court of Appeals for the Second Circuit in a judgment entered July 30, 1968. Petitioner has made no application for a rehearing.

There is jurisdiction in this Court to entertain an application for the granting of a writ of certiorari predicated upon the provisions of Section 1254 (1), Title 28 of the United States Code and Rule 19 (1) (b) of the Supreme Court Rules. The Court below has determined important questions of Federal law which have not but should be settled by this Court. Petitioner will argue herein that the lower Court has departed from the accepted and usual course of jurisdictional proceedings and the Appellate Court has so far sanctioned such departure, requiring an exercise of this Court's power of supervision.

Questions Presented for Review

1. Petitioner was accused of conspiring to interfere with the movement of money in commerce by robbery. The proof in support of the indictment demonstrated only that there would have been an interference with the movement of checks in commerce had the robbery been successful. Was not petitioner's right to *due process* thereby violated? Was not the proof submitted proof of a crime not charged in the indictment?

2. May petitioner be convicted for an obstruction to commerce not anticipated by the conspirators where the robbery was unconsummated? Is not the proof of an ob-

struction to commerce from the conspiracy not limited to the purview of the conspiracy?

3. Section 2314 of the United States Code requires that there be stolen money, goods, wares or merchandise in existence before the substantive Section may be violated. Does not a conspiracy pursuant to Section 371 of the United States Code require the existence of all of the elements of the substantive crime before a prosecution to so conspire may be maintained?

4. Whether the District Court deprived petitioner of his fundamental right to a fair trial by refusing to order pretrial disclosure of all of the conversations illegally monitored by a Government agency and so acknowledged by the prosecution, instead affording to the petitioner a post-trial hearing to determine "taint"?

Constitutional and Statutory Provisions Involved

Constitution of the United States, Amendment V.

> "No person shall . . . be deprived of life, liberty, or property, without due process of law; . . ."

Constitution of the United States, Amendment VI.

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, . . . and to have the Assistance of Counsel for his defence."

Title 18 U. S. C. Section 371.

> Conspiracy to commit offense or to defraud United States
>
> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or

for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both . . . June 25, 1948, c. 645, 62 Stat. 701."

Title 18 U. S. C. Section 1951.

Interference with commerce by threats or violence

"(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section—

(1) The term 'robbery' means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term 'commerce' means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115,

151-166 of Title 29 or sections 151-188 of Title 45. June 25, 1948, c. 645, 62 Stat. 793."

Title 18 U. S. C. Section 2314.

Transportation of stolen goods, securities, moneys, fraudulent State tax stamps, or articles used in counterfeiting

"Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; . . .

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both . . . As amended July 9, 1956, c. 519, 70 Stat. 507; Oct. 4, 1961, Pub. L. 87-371, Section 2, 75 Stat. 802."

Statement of the Case

The defendant and others were jointly indicated on August 18, 1967, tried and convicted for conspiring to obstruct commerce and the movement of money in commerce by robbery.

The second count of the indictment accused all of the defendants of conspiring to knowingly transport in interstate commerce stolen monies, goods and wares over the value of $5,000.00, knowing them to have been stolen: despite testimony to the grand jury that in fact no stolen money or other articles capable of transport ever came into being. The robberies which would have afforded the stolen monies and goods were aborted.

Before trial the defendant moved to dismiss Count II, arguing that since the substantive offense (Section 2314) required knowledge that the monies were actually stolen, there could not be an actionable conspiracy to contravene that Section, until stolen money or other goods were in ex-

istence. The Prosecution challenged this motion. The District Court refused to dismiss.

The Prosecution in response to a demand therefor, included in a bill of particulars requested by counsel for co-defendant FREDERICO G. RANDACCIO, admitted there had been illegal electronic surveillance of petitioner and of that co-defendant (Randaccio) during the month of February, 1965 and for some two years before that. The Assistant United States Prosecutor denied that any use had been made by the prosecution of the "fruits" of that illegal surveillance and asserted that the Attorney General's Office in Washington had assured him that the "fruits" of the surveillance were impertinent to the indictment (A. 23).*

The District Court denied petitioner's motion for an order directing the Prosecution to disclose to him all of the conversations illegally surveilled so that counsel for petitioner might determine if *in his opinion* there were any leads available to the Government by its trespass. That Court deemed it sufficient that petitioner and co-defendants be afforded a post-conviction hearing if petitioner was convicted (A. 26). Petiitoner sought mandamus from the Second Circuit Court of Appeals directing the District Court to afford him the requested hearing before trial. That request was denied (A. 27).

The Government disclosed in its opening to the jurors that the Prosecution would premise an interference with interstate commerce upon a showing that a successful robbery, as described in the first count, would include the taking of checks destined for transit interstate (A. 31).

The petitioner then moved (A. 30) for a dismissal of the first count, predicating that motion upon the opening

* A. Denotes Page number in the Appendix.

statement. The argument was that the anticipated offer of proof was outside the purview of the indictment returned by the grand jury, since the charging portion therein restricted itself to an interference with the movement of money therein. The Court summarily denied the motion (A. 31).

The Court admitted into evidence, over objection, testimony and exhibits that the money bag the petitioners allegedly conspired in the month of February, 1965 to steal, included therein checks payable out of state. However, testimony from the co-conspirator demonstrated that for all practical purposes the robbery was aborted on February 17, 1965.

Motions to dismiss each count of the indictment were renewed at the close of the People's case and denied. The motions were based on legal argument heretofore made (A. 31).

The petitioner requested post-conviction that the Court examine the grand jury minutes to determine if the grand jury based its indictment (Count I) upon an interference with the flow of checks in interstate commerce. The Court determined that there was a sufficiency of evidence for the grand jury to find that the conspiracy embraced an obstruction, delay or affect upon commerce by robbery as alleged in Count I (A. 26).

The Prosecution depended upon testimony for an alleged co-conspirator for its proof that the petitioners planned two robberies during the month of February, 1965.

The testimony of the witness PASCAL CALABRESE demonstrated the plan was originally formulated during the evening of February 5, 1965 at a meeting in Pasquale Natarelli's home. Calabrese there agreed with the petitioners

Frederico G. Randaccio, Pasquale A. Natarelli and Stephen A. Cino that he would travel to Los Angeles expressly to rob a woman of a great deal of jewelry, then, and in that order, to rob a messenger carrying a large sum of money from the Beverly Hilton Hotel to an armored car.

Calabrese would be assisted in these robberies by the petitioner Charles Cacci and Louis Sorgi, who were in Los Angeles. Charles Caci was an entertainer, then between jobs. Louis Sorgi was employed as chief security officer at the Beverly Hilton Hotel. Stephen Cino would follow Pascal Calabrese to the Coast and afford whatever additional assistance was needed.

Pascal Calabrese arrived in Los Angeles on February 7, 1965 followed by Stephen Cino a few days later. The conspirators met regularly to work out the most feasible way in which to rob the jewerly and the money. The plans were stalled because the woman did not arrive at the Beverly Hilton Hotel as was anticipated by the conspirators.

Several days later on or about February 17, 1965, the robberies were abandoned because Pascal Calabrese found out that he had been indicted for a robbery he had committed in Buffalo, New York. Stephen Cino had received a telephone call from his father-in-law who told him of the indictment and directed that he return to Buffalo immediately. Cino did forthwith return to Buffalo. Calabrese left California on February 17, 1965.

ARGUMENT IN SUPPORT OF THE GRANTING OF A WRIT

Point I

The Grand Jury indictment accused petitioner of conspiring to affect the movement of *money* in commerce by robbery. The Grand Jury did not indict petitioner for a conspiracy to affect the movement of checks in commerce by robbery. Yet, despite objection by counsel for the petitioner, the District Court permitted the Prosecution to premise its entire case upon a showing to the trial jury that a successful robbery would have impeded the flow of checks in interstate commerce, a crime separate and distinct from the crime charged to petitioner in the first count of the indictment.

Petitioner urges that the fact situation in the instant case is similar to if not stronger than the fact situation existing in *Stirone v. United States,* 361 U. S. 213.

Stirone, a union official, was prosecuted under the Hobbs Act, accused by the Grand Jury of obstructing the movement of materials and supplies (sand) from points outside Pennsylvania to a concrete manufacturing plant of a manufacturer in Pennsylvania. This manufacturer had a contract to supply concrete from his Pennsylvania plant to be used for the erection of a steel processing plant at another point in Pennsylvania. The trial Court there, over the defendant's objection, permitted the Government to offer evidence of defendant's interference, not only with the shipments of supplies and materials (sand) as above, *but also with prospective steel shipments from the Pennsylvania steel processing plant later to be built with the manufacturer's concrete.*

This Court determined reversal of that conviction was required (See page 217 thereof). The indictment here

> ". . . cannot fairly be read as charging interference with movements of steel from Pennsylvania to other States nor does the Court of Appeals appear to have so read it. The Grand Jury which found this indictment was satisfied to charge that Stirone's conduct interfered with interstate importation of sand. But neither this nor any other court can know that the grand jury would have been willing to charge that Stirone's conduct would interfere with interstate exportation of steel from a mill later to be built with Rider's concrete. And it cannot be said with certainty that with a new basis for conviction added, Stirone was convicted solely on the charge made in the indictment the grand jury returned . . . While there was a variance in the sense of a variation between pleading and proof, that variation here destroyed the defendant's substantial right to be tried only on charges presented in an indictment returned by a grand jury. Deprivation of such a basic right is far too serious to be treated as nothing more than a variance and then dismissed as harmless error . . . The very purpose of the requirement that a man be indicted by grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge. Thus the basic protection the grand jury was designed to afford is defeated by a device or method which subjects the defendant to prosecution for interference with interstate commerce which the grand jury did not charge."

The District Court ignored or did not appreciate that an obstruction to the movement of checks in commerce is a different crime from an obstruction to commerce caused by the interference with the movement of money therein, despite that the means employed may be the same, *i.e.:* robbery. The same robbery might well obstruct commerce in more ways than one, but each obstruction is a distinct and independent crime and must be alleged by the grand jury to be prosecutable.

Petitioner submits that the proof offered to the trial jury against Stirone included proof therein that Stirone was guilty as charged in the indictment, attended by additional proof that commerce was affected in a manner not charged by the grand jury. The Prosecution in your petitioner's case made no attempt to prove the obstruction charged in the indictment.

The Appellate Court considered this argument frivolous, a conclusion petitioner respectfully disputes.

Point II

The Second Circuit determined that:

> "The instruction by the trial Judge to the jurors that the defendants need not have intended to affect commerce in order to be guilty was entirely correct."

and based its conclusion on *Nick v. United States,* 122 F. 2d 600, Cert. denied, 314 U. S. 687: *United States v. Varlack,* 225 F. 2d 665: *United States v. Pranno,* 385 F. 2d 387, Cert. denied, 390 U. S. 944. But those cases relied upon by the Appellate Court are all cases of consummated crimes, distinguished from the instant case. The record is devoid of proof from which the jurors might conclude or infer that an interference with the flow of checks in commerce was either one of the objects of the conspiracy or that the defendants knew or could foresee that such interference would be provoked from the conspiracy to rob a messenger.

The proof offered by the Government in support of a conviction violative of the Hobbs Act would be pertinent had the crime been consummated. The original intent would not be a defense to a conviction since an actual taking would have occurred flowing from his act. The Second Circuit reversed a conviction and dismissed an indictment against

Russell Bufalino and others 285 F. 2d 415, predicated in part upon similar reasoning.

Point III

Petitioner challenges the validity of the second count of the indictment wherein he is accused of conspiring to transport in interstate commerce stolen money, knowing it to have been stolen, despite that no money or other goods susceptible of such transportation in interstate commerce was stolen. The sensible meaning and intendment of the substantive section petitioner was therein accused of conspiring to violate (Section 2314 of the United States Code) is to prohibit, by punishment therefor, illegal transportation in interstate commerce of money over the value of $5,000.00, knowing it to have been stolen.

The language used in Section 2314 anticipates the existence of "stolen money" as an indispensable condition precedent to the effective consummation of that crime or a conspiracy to do so. *Without "stolen money", the crime of transportation cannot occur, for there is no "corpus" available for transport as proscribed by Section 2314. Therefore, an agreement between the defendants is not punishable for a violation of that Section until the "corpus" is born;* this is not an agreement within the intendment of the provisions of the substantive offense. In such a fact circumstance, any alleged overt act or acts cannot effect the object of the conspiracy, a prerequisite of the requirements of Section 371 of the United States Code.

It is agreed that Federal Courts have determined an act done in furtherance of a conspiracy is sufficient to come within the purview of Section 371 of the United States Code. But, it is respectfully suggested that this is error. Section 371 requires that an overt act to be criminal must

be to *effect the object of the conspiracy,* distinguished from an act done in furtherance thereof.

Petitioner concludes that unless and until there are stolen goods capable of transport, any charged overt act is not an overt act within the intendment of Section 371 as it applies to a conspiracy to violate the proscriptions of substantive Section 2314.

Point IV

Kolod v. United States No. 133 granting certiorari January 29, 1968, reargued May 2, 1968, is in support of petitioner's argument that he ought to have been given all of the illegally electronically monitored conversations the Government had in its possession; the reasoning there being applicable:

> "We read the response as admitting that Alderisio's conversations were overheard by unlawful electronic eavesdropping but as justifying nondisclosure on the basis of the Department's determination that the information obtained was not arguably relevant to this prosecution. We cannot accept the Department's *ex parte* determination of relevancy in lieu of such determination in an adversary proceeding in the District Court. Accordingly we grant the petition for certiorari . . ."

That no sensible argument that the Government's proof was "tainted" could be made by petitioner without knowledge of the substance of all of the monitored conversations. That the post-conviction hearing afforded the defendants was an inadequate substitute since the District Court did not direct full prior disclosure to the defendants. The District Court determined for itself the relevancy of all of the monitored conversations, except for those conversations had in February, 1965. Thereby the Government agency pursuing illegal monitoring not only goes unpunished, but

is permitted to withhold what in the judgment of petitioner might be relevant to an argument of "taint", predicated on an assurance by the prosecution that there was no such "taint". *United States v. Birrell,* 692 S. D. N. Y., May 23, 1967, is distinguishable since Birrell had had a pretrial hearing which is all petitioner sought.

Conclusion

The petition for a writ of certiorari to review the conviction had against petitioner in the District Court for the Western District of New York and the affirmance thereof by the United States Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

ANTHONY J. DEMARIE,
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APPENDIX "A"

Letter from Prosecutor Admitting Electronic Surveillance

Andrew F. Phelan
AFP:tr

Civil No. 1967-94
Civil No. 1967-115
Civil No. 1967-116

September 19, 1967

Hon. John O. Henderson
United States District Judge
United States Courthouse
Buffalo, New York 14202

Re: United States v. Frederico G. Randaccio, *et al.*
United States v. Charles Caci, *et al.*
United States v. Thomas Carella, *et al.*

Dear Judge Henderson:

In response to the request of defense counsel made this morning, concerning the existence of electronic surveillance coverage of any of the above-named defendants, such request being made in connection with their motion to suppress, please be advised as follows:

1. During the period of time encompassed by these indictments, the defendants Frederico G. Randaccio, Pasquale A. Natarelli, and Salvatore Pieri, a/k/a Sam Pieri, were on premises that were being electronically surveilled (by trespass) and were participants in various conversations electronically monitored by a federal investigative agency. These are the only defendants and/or co-conspirators named in the above-captioned indictments who were the sub-

jects of any electronic suhveillance known to the Government.

2. The substance of the monitored conversations involving the foresaid defendants was recorded in written logs which are presently within the possession of the Government. Neither counsel for the Government nor any agents connected with the investigation of these cases have ever seen these logs. The logs have been reviewed by the Department of Justice and I am advised that none of the material contained in these logs is relevant or material to the subject matter of the cases presently pending trial.

3. The Government affirmatively states to the Court, and is prepared to submit an affidavit should the Court so desire, that none of the material obtained from such electronic surveillance was a source, either directly or indirectly, which gave rise to the criminal action pending against these defendants; that none of the material obtained therefrom is to be used as evidence in any of the above-captioned cases; nor were any leads to any evidence which the Government will offer on the trial of these cases developed, either directly or indirectly, from such electronic coverage.

Very truly yours,

JOHN T. CURTIN,
United States Attorney,

ANDREW F. PHELAN,
Assistant United States Attorney.

cc:

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APPENDIX "B"

Affidavit from Prosecutor Disclaiming Use of Fruit of Electronic Surveillance

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

vs.

FREDERICO G. RANDACCIO, *et al.,*

Defendants.

CR. 1967-94.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CHARLES CACI, *et al.,*

Defendants.

CR. 1967-115.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THOMAS CARELLA, *et al.,*

Defendants.

CR. 1967-116.

AFFIDAVIT

State of New York,
County of Erie,
City of Buffalo. } ss.:

ANDREW F. PHALEN, being duly sworn, deposes and says:

1. That he is an Assistant United States Attorney for the Western District of New York, and that in such capacity, he has been assigned to represent the Government on the trial of criminal matters numbered CR. 1967-94, CR. 1967-115 and CR. 1967-116, now pending in the United States District Court for the Western District of New York.

2. That your deponent, on September 19, 1967, pursuant to request of defense counsel in CR. 1967-115 made on

September 19, 1967, advised the Court of the existence of monitored conversations of certain of the defendants named in the aforesaid indictments; namely, Frederico G. Randaccio, Pasquale A. Natarelli, and Salvatore Pieri, a/k/a Sam Pieri, by electronic surveillance during the period of time encompassed by the said indictments.

3. That logs containing the substance of these monitored conversations are in possession of the Government, but that your deponent has not seen these logs.

4. That none of the material obtained from such electronic surveillance was a source, either directly or indirectly, which gave rise to the aforesaid criminal indictments now pending against these defendants; that none of the material obtained therefrom is to be used as evidence in the trial of any of the aforesaid indictments; nor were any leads to any evidence which the Government will offer on the trial of the aforesaid indictments developed, directly or indirectly, from such electronic coverage.

/s/ ANDREW F. PHELAN,
Assistant United States Attorney.

Subscribed and sworn to before me
this 20th day of September, 1967.
/s/ Ann K. O'Donnell,
Notary Public, State of New York,
Qualified in Erie County,
My Commission expires Mar. 30, 1969.

APPENDIX "C"

Order from Henderson, J. Denying Pre-Trial Hearing

The Government has acknowledged that during the period covered by the indictment, the defendants Randaccio and Natarelli were on premises subject to electronic surveillance by trespass and that these defendants participated in conversations monitored by a federal investigative agency. The Government represents, however, that this information neither directly nor indirectly gave rise, through leads or otherwise, to the present prosecution. The Government further represents that the logs of those conversations have been reviewed by the Department of Justice and that none of the information contained in these logs is relevant or material, in any manner, to the present indictment. The Government also states that neither counsel nor any agents connected with the prosecution of this case has seen the logs in question.

While it indicates that it is fully prepared to establish these facts upon an evidentiary hearing, the Government, for a number of reasons, requests that this hearing be held after trial. The defendants, on the other hand, seek an immediate pretrial hearing on this issue.

The considerations which prompted Judge Herlands to approve the posttrial procedure in *United States v. Birrell*, 61 Cr. 692 (S. D. N. Y., May 23, 1967), appear to apply equally to the facts of this case.

The defendants argue that since the Supreme Court remanded for a hearing and a new trial in *Black v. United States*, 385 U. S. 26 (1966), that Court has expressly disapproved posttrial hearing procedure in cases involving electronic surveillance. As is demonstrated by the Supreme

Court's later remand for a posttrial hearing in *Hoffa v. United States*, 387 U. S. 231 (1967), the handling of *Black v. United States, supra,* was based upon the peculiar facts of that case. While certainly not authority for holding a posttrial hearing under the present circumstances, *Hoffa v. United States, supra,* demonstrates that no basic constitutional infirmity exists with respect to such procedure.

The Government's application for a posttrial hearing is granted.

So ordered.

/s/ JOHN O. HENDERSON,
JOHN O. HENDERSON,
United States District Judge.

Dated: September 26, 1967.

APPENDIX "D"

Order Denying Mandamus

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

In the Matter of the Petition
of
FREDERICO G. RANDACCIO.

Before FRIENDLY, HAYS and ANDERSON, *C. JJ.*

Motion for a writ of mandamus etc.

For a writ of mandamus compelling the HON. JOHN O. HENDERSON, Judge of the United States District Court for

the Western District of New York to vacate his order entered September 26th, 1967, denying petitioner's motion for an order directing that a hearing be held prior to trial at which time the United States of America would be required to prove beyond a reasonable doubt that the evidence which it intends to introduce against the petitioner at the trial is untainted by the evidence unlawfully seized from the petitioner during the time covered by this indictment by the use of electronic surveillance conducted by trespass, and compelling him further to grant petitioner's relief requested in said motion, or in the alternative to entertain objections at the trial to the evidence offered by the United States of America on the Ground that it is so tainted,

Also, for a writ of mandamus compelling the Hon. John O. Henderson, Judge of the United States District Court for the Western District of New York to vacate his order entered on September 28th, 1967 denying petitioner's motion for an order directing that he be accorded a preliminary hearing under Rule 5(c) of the Federal Rules of Criminal Procedure and compelling him further to grant the petitioner's relief requiring such a preliminary hearing be held, or in the alternative,

To issue such a writ necessary and appropriate to aid in the equitable invocation of well established principles of law.

LIPSITZ, GREEN, FAHRINGER, ROLL,
SCHULLER and JAMES,
Buffalo, New York, *for Petitioner,*

Herald Price Fahringer, *of counsel.*

10/4/67

The petitions for mandamus and for a stay are denied.

While F. R. Cr. P. 41(e) requires motions to suppress evidence to be made in advance of trial save where there is good cause for failing to do so and the judge should ordinarily dispose of such motions in advance of trial, the rule does not require him to do so. As to this we agree with the opinion of Judge Aldrich in United States v. Leiser, 16 F. R. D. 199 (D. Mass. 1954). Still more clearly the Rule does not require the judge to conduct a pre-trial hearing that would go beyond the suppression of the evidence alleged to have been illegally seized and would seek to determine what use the government intends to make of it; whether to conduct such an inquiry in advance of trial and, if so, to what extent rests in the sound discretion of the trial court. So far as concerns defendants' rights to discovery under Rule 16 the Government has now agreed to make available the logs of the electronic surveillance during any relevant period.

We do not mean our denial of the writ to be taken as necessarily sanctioning the postponement of determinations with respect to illegally obtained evidence until after the trial. This could well be unfair to a defendant unless the Government agreed, as it apparently has done here, that admission of any material evidence found to have been obtained in violation of a defendant's constitutional rights shall require dismissal of the indictment.

We have considered the alternative argument as to denial of a hearing under F. R. Cr. P. 5(c) as a result of the intervening indictments and find it without merit.

H. J. F., P. R. H., R. P. A.,
U. S. C., JJ.

APPENDIX "E"

Motion to Dismiss Count I of the Indictment After Prosecution Opening

The Court: All right.

Mr. Rodenberg: Firstly, your Honor, the argument I am about to make is predicated on Stirone against the United States, [137] decided in 1960. This is 80 Supreme Court, Page 270. Now, if your Honor will notice, the indictment against these defendants, of course, the offense is the interference, sir, with commerce. Now, the first count of the indictment reads this way, that these defendants, and with other persons whose names are unknown to the grand jury, to obstruct, delay and effect commerce and the movement of money in commerce by robbery. Your Honor, I submit that this is the charging portion of the indictment, this is the offense which the grand jury, sir, has chosen to lay against these defendants, that the interference which would come from a successful conspiracy to rob, would interfere with the movement of money in commerce. There is no reference, sir, to negotiable instruments, which, of course, checks are, which are entirely different from money. Now, this is more than a variance or [138] technicality, it is clearly expressed in Stirone against the United States. There, sir, the defendant had been charged with unlawfully obstructing, delaying interstate commerce between the several states and the movement of aforesaid materials and supplies in such commerce by extortion. The supplies and materials were to be shipped to the site of his plant for the manufacture or mixing of ready-mix concrete and, more particularly, they came from outside the state of Pennsylvania. The point is that because the offense is the interference with com-

merce, and the only allegation in this indictment is that the movement of money would be affected, not checks; that if Mr. Phelan intends to prove the offense, that is, the interference with commerce, by introducing checks, he is completely outside the purview of this indictment; that checks are not material proof. If this is the [139] only proof he will submit that there would have been an interference, of course, on the basis of his opening statement the indictment must fall. As I say, sir, Stirone against the United States is almost directly in point with the argument being made here. If your Honor would like, I have the citation here. I could hand it up to the Bench.

The Court: It isn't necessary. Is that your argument?

Mr. Rodenberg: That, sir, is the argument.

The Court: Denied. Call the jury back.

APPENDIX "F"

Excerpt from Opening Statement by the Prosecutor, Andrew Phelan

[129] I did mention to you that the Government must establish an affect upon interstate commerce. Although the defendants need not know, the [130] co-conspirators need not know what the affect will be at the time of their agreement. I believe the Government's proof in this case will show that the messenger for the Armored Transport Company was transporting proceeds, daily proceeds, from the Beverly Hilton Hotel to a Bank in Beverly Hills, in this case the United California Bank. The pouch in which the proceeds were, contain money, cash and checks, both personal checks and travelers checks. The records of the Beverly Hilton Hotel clearly establish where the checks

were drawn on for each of the days throughout the period of this indictment, that being February, 1965. The records of the Hotel will establish travelers checks by number that were cashed at the hotel. Personnel from the hotel will appear as witnesses, and I believe the the testimony will be that each of the checks taken in by the hotel went into the pouch, [131] were transported by the messenger to the United California Bank.

These items, checks and articles which are moving in the stream of interstate commerce, once they are negotiated at the Beverly Hilton Hotel to be paid on or for encashment, they must of necessity do to the home state bank on which they were drawn. In the case of the travelers checks, they must clear the home office. The stream commences, ladies and gentlemen, at the time they are cashed. They must go, as of that moment, according to regular, normal, banking procedures, they go from the desk of the cashier of the Beverly Hilton by messenger to the United California Bank by direct delivery, and from the United California Bank to the home bank or from there to the Federal Reserve Bank of Los Angeles and from the Federal Reserve Bank to the home bank. They are in the stream of interstate commerce from [132] the moment they are cashed. Each step moves them further along their way. I submit to you that if the Government establishes its burden on this element, with the conspiracy to rob this messenger and the breaking of that stream of interstate commerce, the affect, the obstructing of the delivery and the transportation of those checks, those items, with the conspiracy to commit the robbery of that messenger, it could not be obstructed or broken in any much more serious manner than to sever it right there. This then, frankly, is the proof we expect to offer.

As I have said, we do not consider it an extremely involved situation. I believe the Government's proof will establish beyond a reasonable doubt the establishment of an agreement and, certainly, numerous acts in furtherance of the successful execution of this agreement. These individuals were then, prepared to [133] execute the robberies, as planned; that because of an unforeseen circumstance, it stopped at a point, the robberies were never successfully effectuated. Those are the charges, they did conspire to commit these acts.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968.

No. 546

JAMES R. HOFFA, THOMAS EWING PARKS and LARRY CAMPBELL,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968.

No. .....

JAMES R. HOFFA, THOMAS EWING PARKS and LARRY CAMPBELL,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit.

Petitioners pray that a writ of certiorari be issued to review the judgments of the United States Court of Appeals for the Sixth Circuit, entered in this cause on July 23, 1968.

OPINIONS BELOW.

The opinion of the Court of Appeals has not yet been reported, and is printed as Appendix A, *infra*. The opinion of the District Court is printed as Appendix B, *infra*.

JURISDICTION.

The judgments of the Court of Appeals (Appendix C, *infra*) were entered on July 23, 1968. On August 12, 1968, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to September 21, 1968. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED.

I. Whether petitioners, having filed a motion for new trial attacking the constitutionality of their convictions because of the government's illegal eavesdropping, before and during their trial, on the conversations of petitioners, their counsel, and agents, should have been entitled to dismiss their motion without prejudice.

II. Whether the scope of the hearing in the District Court on the issue of the government's illegal eavesdropping was improperly limited by the Court's striking of certain allegations of such eavesdropping on defense counsel and defense agents.

STATEMENT.

Nature of the Case.

Petitioners were convicted in 1964 in the United States District Court for the Eastern District of Tennessee on a charge of endeavoring to influence petit jurors in the 1962 trial of **United States v. James R. Hoffa and Commercial Carriers, Inc.** Said convictions were affirmed by the Court of Appeals, 349 F. 2d 20 (6 Cir.), and by this Court, 385 U. S. 293. Petitioners since March 7, 1967 have been and are presently imprisoned in service of the sentences imposed on these convictions.

Motion for New Trial.

On February 28, 1967 petitioners filed in the District Court a motion for new trial based on newly discovered evidence, alleging that prior to and during the trial below petitioners, their counsel and associates were subjected by Government agents and representatives to wiretapping, illegal eavesdropping, and other unlawful interference (App. 12a-34a).[1] Attached to the motion for new trial were various affidavits and other documents corroborative of the allegations of the motion (App. 35a-121a). The motion in substance made the following assertions:

a. That during the trial below Justice Department agents and representatives had tapped the telephones of petitioner Hoffa and his counsel in their offices and living quarters, and had intruded on conferences between petitioners and their counsel (App. 12a, 16a-20a).

b. That a Justice Department representative, who was in charge of the investigation of petitioner Hoffa, had in his possession prior to the trial recordings of private conferences between petitioner Hoffa and his counsel, which recordings were exhibited to prospective Government witnesses (App. 12a, 20a-28a).

c. That telephone conversations of one of petitioner Hoffa's counsel, one Bufalino, were monitored and transcribed by City of Detroit police officers, under circumstances suggesting that such eavesdropping was performed on behalf of the Federal Government (App. 13a, 28a-30a).

d. That in the case of **United States v. O'Brien**, the Government conceded to this Court that it had during the trial below by illegal electronic surveillance overheard

[1] "App." references are to petitioners' joint appendix which was filed in the Court of Appeals.

two conversations of one Charles O'Brien, a close associate of and defense investigator for petitioner Hoffa in this case. At least one of said conversations was between said O'Brien and Hoffa's chief trial counsel in this case (App. 14a, 25a-26a).

e. That in 1961, while petitioner Hoffa's counsel were in Orlando, Florida in connection with his defenses of an earlier criminal case, an electronic transmitter was found in counsel's conference room, while counsel were conferring relative to said case (App. 30a-31a). The transmitter was turned over to the Federal Bureau of Investigation for examination, but was never returned (App. 86a-88a).

Proceedings in the District Court.

In response to the motion for new trial, the Government filed counter-affidavits, substantially denying the charges made in the motion (App. 129a-172a). By reason of the issues of fact thereby raised, the District Court ordered an evidentiary hearing on the motion (App. 183a-185a). The Court ordered that the scope of the hearing was "to be upon all issues of fact raised by the pending motion for new trial and any amendment thereto or that may be defined by further orders of the Court" (App. 188a).

On April 27, 1967, twelve days prior to the scheduled hearing, the District Court ruled that no evidentiary hearing would be permitted with regard to the allegations of wiretapping of counsel Bufalino's telephone, with regard to the discovery of the electronic transmitter in counsel's Orlando hotel room, or with regard to the Government's admitted eavesdrop and intrusion into the conversations of investigator O'Brien (App. 241a-242a).

The Dismissal of the Motion With Prejudice.

On the date of the scheduled hearing on the motion for new trial, defense counsel, in a requested conference in chambers, disclosed that certain information had just come to their attention, which was of such a nature that counsel felt it would be improper to proceed with the motion at that time (App. 247a). The defense moved that the hearing be continued for a period of ninety days, informed the Court that the matters which had come to the attention of the defense were learned as recently as thirty-eight hours before the hearing (App. 247a), and related to the matters which were the subject of the hearing (App. 260a).

The motion for continuance of the hearing was denied (App. 257a-258a), whereupon petitioners sought leave of Court to dismiss the motion for new trial without prejudice (App. 258a-260a). The Court denied such request (App. 261a), and called for the presentation of evidence in support of the motion (App. 261a). Petitioners informed the Court that under the circumstances they could not proceed, and renewed their motions for a continuance or a dismissal without prejudice (App. 262a). The Government moved for a denial of the motion for new trial (App. 267a), and on the following day the Court entered an opinion dismissing the motion for new trial with prejudice (App. 272a-277a), and thereafter entered a formal order denying the motion for the reasons set forth in its opinion (App. 279a).

The Court's ruling was affirmed by the Court of Appeals, which held that the District Court's denial of the motion for continuance and for leave to dismiss without prejudice did not constitute an abuse of discretion. The Court of Appeals held that it was proper for the District Judge to deny and dismiss the motion, and also ruled that

the District Court had properly stricken certain of the allegations of the motion because they were not "sufficiently relevant or material to the trial . . . to require taking testimony concerning them."

REASONS FOR GRANTING THE WRIT.

I. The Denial of Petitioners' Motion for Dismissal Without Prejudice of Their Motion for New Trial.

This case presents for determination by this Court the important question of whether a motion for new trial based on newly discovered evidence that the government had illegally electronically eavesdropped on the defendants and their counsel before and during the trial may be dismissed by the defense without prejudice. Essentially at issue is whether a defendant shall have the effective right to prove to the Court that his case was not tried without unlawful interference by the government in the councils of his defense. We submit that the denial of the motion for continuance of the hearing on the motion for new trial and the ultimate dismissal of said motion with prejudice, under the circumstances of this cause, constituted grievous error which should receive the authoritative review of this Court.

It must be remembered that the instant motion for new trial was filed on February 28, 1967 (App. 12a). On the date set for hearing of said motion, May 9, defense counsel moved for a continuance of said hearing date on the ground that certain information had come to the attention of counsel which was of such nature as made it improper for counsel to proceed with the hearing at that time (App. 243a-244a). Counsel requested a ninety day continuance so that they could become fully informed on the matters thus brought to their attention. Petitioners were then and

are now still incarcerated under the judgments of conviction below (App. 259a). Yet, the motion for continuance was denied (App. 257a-258a), and petitioners' motion that they be permitted to dismiss their motion for new trial without prejudice was likewise denied (App. 258a-261a).

These rulings by the District Court, it is urged, constituted a flagrant abuse of the Court's discretion. A dismissal with prejudice is a harsh sanction and a drastic remedy which should be resorted to only in extreme circumstances. **Davis v. Operation Amigo, Inc.**, 10 Cir., 378 F. 2d 101; **Independent Productions Corp. v. Loews, Inc.**, 2 Cir., 283 F. 2d 730; **Syracuse Broadcasting Corp. v. Newhouse**, 2 Cir., 271 F. 2d 910. The District Court in ruling on a motion to dismiss an action without prejudice should weigh all of the equities, and make that decision which seems fairest under all the circumstances of the particular case. **Klintworth v. Atlantic Coastline R. Co.**, D. C. S. C., 39 F. R. D. 330. Since the law favors the disposition of litigation on its merits, **Meeker v. Rizley**, 10 Cir., 324 F. 2d 269, and since dismissal of an action with prejudice even in a civil case is considered a harsh sanction, *a fortiori* should a defendant's claim in a criminal case not be lightly or procedurally foreclosed where the issue relates to the constitutionality of the conviction and the fairness of the trial. The discretion vested in the Court on the issue of whether a dismissal should be with or without prejudice is a judicial and not an arbitrary discretion. **International Shoe Company v. Cool**, 8 Cir., 154 F. 2d 778. The right to dismiss without prejudice ought not be defeated unless some plain legal prejudice would result to the opposing party. Can it be reasonably contended that under the circumstances of this case the government would have been prejudiced by a dismissal without prejudice, or that the dismissal with prejudice was conducive to the fair administration of justice?

As stated, the motion of the defendants for a new trial based on the newly discovered evidence that they and their counsel were electronically eavesdropped upon before and during the trial was filed only slightly more than two months before the date of the requested dismissal. Petitioners themselves were incarcerated at the time of the requested dismissal, and a dismissal without prejudice would not have effectuated their release. Similarily a continuance of the hearing date on the motion or a dismissal without prejudice would not have adversely affected or impeded the government's review of its files to determine whether any electronic eavesdropping or monitoring had affected this case. For, in **Schipani v. United States**, 385 U. S. 372, the Solicitor General advised this Court that the Justice Department was at about this very time conducting a review of its files in order to determine in which cases improper monitoring of the defense may have tainted the proceedings.

The motion for new trial should have been more seriously considered, for it is not mere idle speculation to suggest that electronic eavesdropping occurred in this case. It is well known that petitioner Hoffa has for a long time been the subject of intensive government investigation. Indeed, about one month prior to May 9, 1967, the government advised this Court that it had electronically eavesdropped on a codefendant of petitioner Hoffa in another pending case and had overheard such codefendant discussing the theory of the defense with a friend. **Hoffa v. United States**, 387 U. S. 231. And the government has also admitted that it electronically intruded on a conversation between petitioner Hoffa's trial counsel in this case and one O'Brien, a defense investigator of petitioner Hoffa. **O'Brien v. United States**, 386 U. S. 345. The log of said **O'Brien** eavesdrop has to this date been withheld by the government from petitioner Hoffa, and the pro-

priety of such withholding is in issue in **United States v. Hoffa**, No. 16634, United States Court of Appeals for the Seventh Circuit (presently pending on petition for rehearing).

Of course, other instances of the government's widespread eavesdropping activities on the councils of an accused are well known to this Court. **Levine v. United States**, 383 U. S. 265; **Roberts v. United States**, 88 S. Ct. 1; **Katz v. United States**, 9 Cir., 369 F. 2d 130; 88 S. Ct. 507.

Under these circumstances, it would appear evident that the equities of the case and concern for the doing of substantial justice should have warranted a ruling by the District Court which could not be interpreted to preclude an attempt by the defense at some time in the future to prove that government electric eavesdropping did in fact taint their convictions. The Court of Appeals construed the District Court's order as not precluding further motions on electronic surveillance grounded on matters "other than that described" in the instant motion for new trial (Appendix A, infra, p. 19). We submit that petitioners should not be precluded from urging any matter of unlawful electronic eavesdropping affecting this cause, whether the same be contained in the instant motion for new trial or be grounded on matters thereafter coming to petitioners' attention. Review by this Court of the ruling below under these circumstances seems particularly warranted.

II. **The Striking From the Motion for New Trial of Allegations of Eavesdropping on Defense Counsel and Agents.**

Herein also presented for review by this Court is the all important question of the scope of a hearing to be

conducted by a District Court where the validity of a conviction is attacked on the ground of alleged interference by the government with the defendants' effective assistance of counsel and with the defendants' right to conduct his defense unhampered by government intrusion. Of course, an accused's right to the assistance of counsel under the Sixth Amendment is vitiated if the government is permitted with immunity electronically to monitor and transcribe the private conversations of defense counsel and defendants' agents relative to the matters then pending on indictment. **Black v. United States,** 385 U. S. 26; **O'Brien v. United States,** 386 U. S. 345. Similarily, the guaranty against unreasonable searches and seizures under the Fourth Amendment is devoid of meaning if government agents may by electronic intrusions seize the conversations of an accused's representative and use such conversations or the fruits thereof to obtain a conviction. **Katz v. United States,** 88 S. Ct. 507.

A hearing seeking judicial review of whether a conviction is tainted by such government intrusion and illegal eavesdropping should be a full-scale hearing and not one limited in nature. In **Hoffa v. United States,** 387 U. S. 231, wherein the government advised this Court that a conversation between one of the defendants and a friend had been overheard by agents of the government, the government represented that the recorded conversation was only "peripherally relevant to the charges underlying" the conviction, and suggested that a hearing be held only to determine whether **such** defendant's conviction was thereby tainted. The Court however vacated the judgments of conviction as to all defendants and ordered a hearing in the District Court "on the nature and relevance to [the] convictions of the recorded conversation and **of any other conversation** that may be shown to have been overheard through similar eavesdropping" (Emphasis supplied). Thus, the Court in unequivocal language

indicated that a hearing in which the constitutionality of a conviction is in controversy should not be limited to the one instance of eavesdropping admitted by the government, but should relate to all evidence of any eavesdropping activities conducted by the government which may be shown to have tainted the conviction.

Similarly in **Kolod v. United States**, 88 S. Ct. 752 (presently pending on the government's motion to modify), this Court ordered a hearing in the District Court on the relevance to the convictions of **any conversations** shown to have been overheard through unlawful electronic surveillance at a particular place of business. Even the dissenting opinions in **Black v. United States**, supra, and **O'Brien v. United States**, supra, though not agreeing that the convictions should be reversed because of the admitted eavesdropping, believed that the petitioners in those cases were entitled in the District Court to a "full scale development of the facts."

Under these circumstances, it seems clear that the District Court here erred in striking from the motion and in refusing to permit a hearing on certain important portions of the motion for new trial (App. 238a-242a). Petitioners believe that it was highly relevant to the validity of the conviction below that petitioner Hoffa's counsel, Bufalino, was in 1962 and 1963 electronically eavesdropped upon at his home by members of the Detroit, Michigan, Police Department, and that some of such electronic eavesdropping related to the conversations between said Bufalino and other counsel "regarding legal strategy" (App. 29a-30a). Since Bufalino had acted as liaison between petitioner Hoffa, his trial counsel, and counsel for the other petitioners in this case and had had numerous telephone conversations from his home telephone relating to interviews with witnesses and legal trial strategy (App. 28a-30a), the relevancy to the validity of the conviction seems clear.

Similarly, petitioners submit that it was pertinent to the inquiry below and to the continuous pattern of government eavesdropping to prove that an electronic transmitter was found in the hotel room of petitioner Hoffa's counsel in 1961, when conferences were in progress between defense counsel relating to a pending indictment (App. 30a-31a).

And perhaps most importantly of all, petitioners believe that they were entitled to a hearing on the issue of the relevancy to this conviction of the government's admitted eavesdrop on defense investigator O'Brien. This Court in **O'Brien v. United States**, 386 U. S. 345, reversed O'Brien's conviction, and that of O'Brien's codefendant, because of the government's eavesdropping on a conversation between O'Brien and one James Haggerty, petitioner Hoffa's trial counsel in this very case. Said conversation was alleged by the government to have occurred in January, 1964, which was either just prior to or during the very trial of this case (App. 14a, 120a). Since said O'Brien was an investigator for the defense, and was in fact in Chattanooga, Tennessee, during a large portion of the trial of the cause below, it was surely not consonant with the spirit of a "full scale hearing" to deprive the defense of the opportunity to show the Court the relevance to this conviction of the government's admitted overhearing of such defense investigator.

Where the issue before the Court relates to the constitutionality of a conviction, particularly where the attack on such constitutionality is bottomed on the government's own illegal conduct, "the integrity of the record must be fully aired", and the reception of evidence ought not be narrowly limited. **United States v. Shotwell Manufacturing Company**, 355 U. S. 233; **Remmer v. United States**, 350 U. S. 377; **Communist Party v. Subversive Activities Com. Bd.**, 351 U. S. 115. In the interest of affording an adequate opportunity to test the constitutional validity

of a conviction thus obtained, this Court in the exercise of its supervisory powers should review the propriety of the Court's action below.

CONCLUSION.

For the reasons hereinabove advanced, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

Nos. 18023, 18030 and 18031.

United States Court of Appeals
For the Sixth Circuit.

United States of America, Plaintiff-Appellee, v. James R. Hoffa, Thomas Evans Parks and Larry Campbell, Defendants-Appellants.	Appeals from the U. S. District Court for the Eastern District of Tennessee.

APPENDIX.

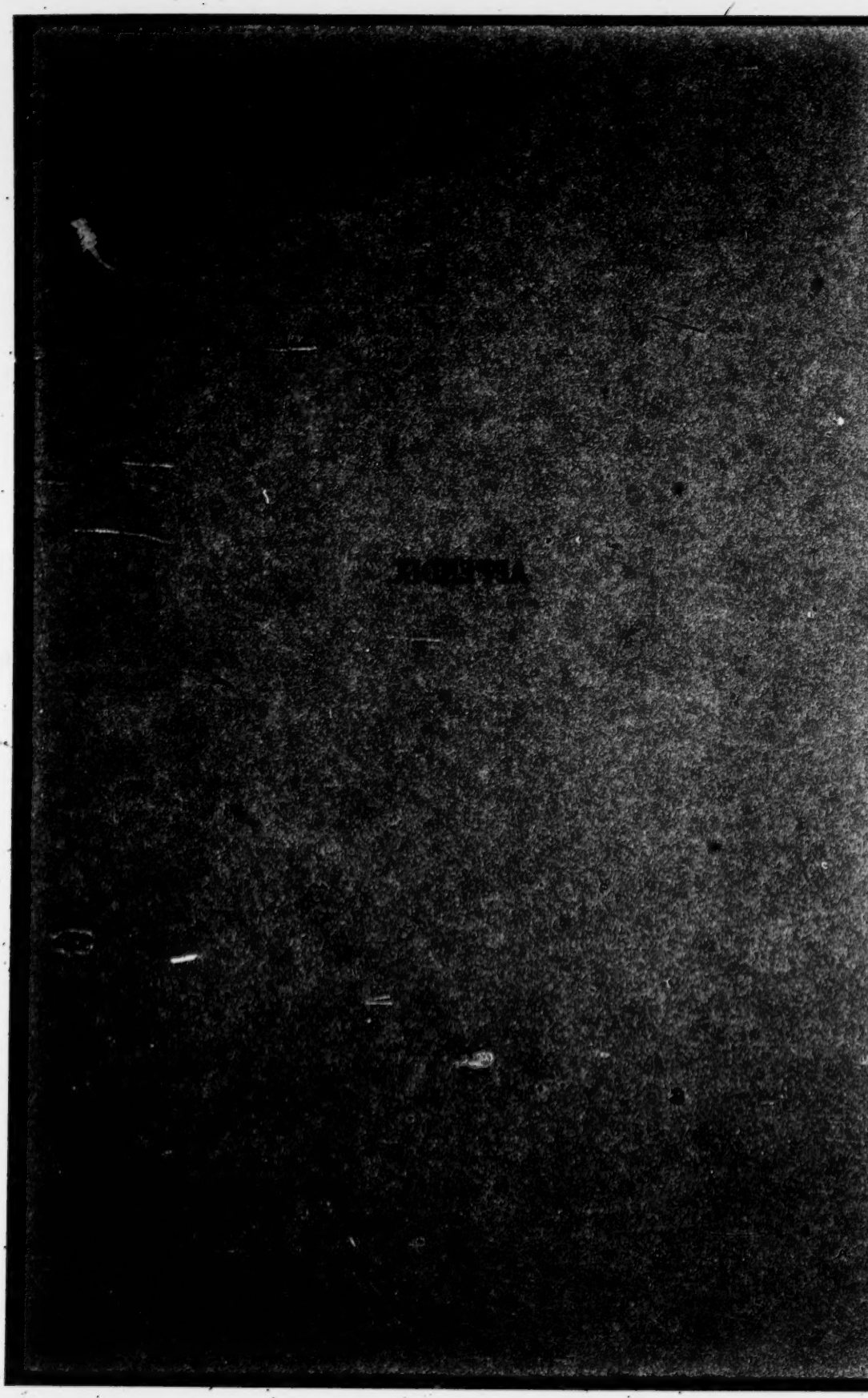
Dated July 12, 1968.

OPINION FILED JULY 26, 1968.

Before: Sullivan, Colombo, Circuit Judges, and Cecil, Senior Circuit Judge.

O'Sullivan, Circuit Judge: This matter involves the appeals of defendants-appellants, above named, from denial of the motion subject for a new trial made by them in the Court below. They had been convicted of endeavoring to influence, intimidate and impede petit jurors in the discharge of their duties, in violation of 18 U. S. C. § 1503, by jury verdict returned in the District Court at Chattanooga, Tennessee, on March 1, 1964. On appeal to this Court, their convicting and the denial of their first motion for new trial were affirmed. United States v. Hoffa, 349 F. (2) 20 (6th Cir. 1965), aff'd 385 U. S. 293, 17 L. Ed. (2) 374 (1966), rehearing dec. 6 February 27, 1967, 386 U. S. 291, 17 L. Ed. (2) 360 (1967). [illegible]

[illegible]



APPENDIX A.

Nos. 18029, 18030 and 18031.

United States Court of Appeals
For the Sixth Circuit.

United States of America, Plaintiff-Appellee, v. James R. Hoffa, Thomas Ewing Parks and Larry Campbell, Defendants-Appellants.	Appeals from the U. S. District Court for the Eastern District of Tennessee.

Decided July 23, 1968.

OPINION FILED JULY 23, 1968.

Before O'Sullivan, Celebrezze, Circuit Judges, and Cecil, Senior Circuit Judge.

O'Sullivan, Circuit Judge. This matter involves the appeals of defendants-appellants, above named, from denial of the fourth motion for a new trial made by them in the above cause. They had been convicted of endeavoring to influence, intimidate and impede petit jurors in the discharge of their duties, in violation of 18 U. S. C., § 1503, by jury verdict returned in the District Court at Chattanooga, Tennessee, on March 4, 1964. On appeal to this Court, their conviction and the denial of their first motion for new trial were affirmed. **United States v. Hoffa**, 349 F. (2) 20 (6th Cir. 1965), **aff'd** 385 U. S. 293, 17 L. Ed. (2) 374 (1966), **rehearing denied**, February 27, 1967, 386 U. S. 951, 17 L. Ed. (2) 880 (1967).[1] A second mo-

[1] On February 20, 1967, the Supreme Court denied appellants' motion to vacate judgment, which alleged violation of their constitutional rights by the use of electronic devices, 386 U. S. 940, 17 L. Ed. (2) 880.

tion for new trial was denied and such denial was affirmed here. **United States v. Hoffa,** 376 F. (2) 1020 (6th Cir. 1967), **cert. denied,** 389 U. S. 859 (1967). The denial of a third motion for new trial, based upon allegedly newly discovered evidence of misconduct of the jurors who convicted appellants, and the United States Marshals who had charge of them, was affirmed by this Court on September 14, 1967, **United States v. Hoffa,** 382 F. (2) 856.

The fourth motion for new trial, now before us, was filed on February 28, 1967, amended April 3, 1967, and was denied by order entered May 13, 1967; this denial followed disallowance of appellants' motion for a 90-day continuance of the hearing on the motion, made on the day set for such hearing, and the refusal to allow the motion's discontinuance without prejudice.

We affirm.

This fourth motion—relying on newly discovered evidence—set out charges of improper electronic surveillence of Hoffa, his witnesses, his associates, and his attorneys, by agents of the United States. The charges were extensive, covering a period before, during and after the 1964 trial and were supported by some 20 affidavits. If true, they disclosed questionable conduct by various government agents, including one Walter Sheridan, whose employment by the Department of Justice had been for the special purpose of investigating the activities of James Hoffa in an earlier case involving Hoffa—known as the Test Fleet case. His employment extended from January, 1961, to August, 1964. The motion recited some 82 specifications of alleged misconduct—tapping telephone lines, "bugging" of hotel rooms, and like electronic surveillance.

The government's response was supported by affidavits substantially denying charges of plaintiffs' motion and its supporting affidavits. The District Judge held that an evi-

dentiary hearing should be had to resolve the factual issues framed by the opposing affidavits relating to 53 paragraphs of the motion. As to the other 19 paragraphs of the motion, he held that the allegations thereof were not relevant to the trial at which appellants were convicted, and they were accordingly stricken. On March 27, 1967, with the agreement of all counsel, the evidentiary hearing was set to go forward on May 8, 1967.

1. The stricken allegations.

The stricken allegations relate, a) to alleged electronic surveillance of the Florida hotel rooms of James Hoffa and his attorney in 1961 before the happening of any of the events involved in the prosecutions before us; b) to some alleged tapping of the residence telephone of a William Buffalino, one of Hoffa's attorneys, by Detroit police officers, but the only claim of involvement of federal officers was an unsupported expression by an affiant Detroit officer that he "was under the belief that these were taps for the federal government"; and c) to the electronic surveillance of two telephone conversations involving one Charles O'Brien, apparently an associate of Hoffa, but as the District Judge correctly found,

> "Exhibits to the defendants' motion in this respect reflect that the two monitored conversations of O'Brien related only to matters regarding his own pending trial."

We agree with the District Judge that such allegations were not sufficiently relevant or material to the trial of the defendants-appellants to require taking testimony concerning them. They were properly stricken.

2. Denial of continuance and discontinuance without prejudice.

On the day finally set for the evidentiary hearing—May 9, 1967—and without earlier request or notice, de-

fendants' counsel moved for a 90-day continuance on the ground that,

> "Within the last several days, certain information has come to the attention of counsel. This information is of such a nature that counsel feel it would be improper for them to proceed with the Motion at this time. This information has been communicated to this defendant [Hoffa], and counsel are authorized in his behalf to ask this Court that this matter be continued for a period of ninety days. Counsel and this defendant feel that to proceed without being fully informed on the matters that were brought to their attention within the last few days would be most improper."

The other appellants joined in this motion. Invited to do so by the District Judge, counsel did not elaborate upon the motion or disclose the nature of the "certain information" that had come to their attention. Neither did counsel disclose what circumstance forbade their disclosing the "certain information". Upon the District Judge's indication that no adequate ground for continuance had been shown, appellants' counsel moved in the alternative that they be allowed to discontinue their motion for new trial without prejudice. The District Judge observed:

> "Gentlemen, I believe that the motion to be allowed to dismiss should be overruled. This matter has been pending now for several months and the hearing date set for today was the date which was requested by counsel for the defendants after the Court had suggested an earlier date. I believe the motion should be overruled, the motion to dismiss [without prejudice], and we should proceed."

Appellants declined to proceed, and the District Judge denied the motion for continuance and for leave to discontinue without prejudice. Thereafter, and on May 19,

1967, the judge entered a final order dismissing and denying the motion for a new trial. We consider that denial of the motions for continuance and for leave to dismiss without prejudice were matters addressed to the discretion of the District Judge, which was not in this regard abused.

His final order concluded:

> "It is accordingly Ordered that the motion for new trial filed upon behalf of each defendant upon February 28, 1967, as amended upon April 3, 1967, be and the same is hereby denied as to each ground thereof, the same having been found to be without merit by the Court, and the motion is accordingly dismissed."

The relevant factual allegations of appellants' motion having been put in issue by the government's affidavits traversing them, the burden was on appellants to go forward with the proofs to sustain their charges; declining to do so, it was proper for the District Judge to deny and dismiss the motion.

In their address to us, appellants express concern that such order would bar any further motions to the District Court should it later be discovered that the government had been guilty of misconduct or electronic surveillance other than that described in the fourth motion for new trial. We do not consider the District Court's disposition of the matter as a holding, as a matter of law, that conduct such as that described in appellants' motion would not, if proven, be grounds for a new trial. Given the opportunity to prove the motion's allegations, appellants declined to do so. It was for that reason the motion was denied, and we affirm for that reason.

Judgment affirmed.

APPENDIX B.

In the United States District Court for the
Middle District of Tennessee,
Southern Division.

United States of America, v. James R. Hoffa, Thomas Ewing Parks, Larry Campbell, and Ewing King.	Criminal No. 11.989.

OPINION—FILED MAY 10, 1967.

This case is before the Court upon a motion for new trial filed on behalf of each defendant, James R. Hoffa, Thomas Ewing Parks, Larry Campbell, and Ewing King. The motion was filed in this Court upon February 28, 1967 and amended upon April 3, 1967.

The defendants were each convicted on March 4, 1964, of violating the Federal Obstruction of Justice Act (18 U. S. C. 1503), in that they did willfully endeavor to influence, intimidate and impede jurors in the discharge of their duties. An original motion for new trial was filed on behalf of each defendant immediately after the trial. That motion was overruled. Thereupon an appeal was taken on behalf of each defendant, resulting in the conviction of each defendant being affirmed by the Court of Appeals on July 29, 1965. **United States v. Hoffa**, 349 F. 2d 20.

Certiorari having been granted by the United States Supreme Court, the conviction of each defendant was affirmed by that Court upon December 12, 1966. **Hoffa v. United States**, ... U. S. ..., 17 L. Ed. 2d 374, 87 S. Ct.

.... A rehearing was denied by the United States Supreme Court upon February 27, 1967. **Hoffa v. United States,** ... U. S. ..., 17 L. Ed. 2d 880, ... S. Ct. .... The defendants were thereupon committed to the custody of the Attorney General to commence serving their respective sentences upon March 7, 1967.

Meanwhile, and during the pendency of the above appeal, a second and third motion for new trial were filed on behalf of each defendant. These motions, based upon allegations of newly discovered evidence, were denied by this Court. **United States v. Hoffa,** 245 F. Supp. 772; **United States v. Hoffa,** 247 F. Supp. 692. The action of this Court in denying the second motion was affirmed by the Court of Appeals by an opinion filed May 2, 1967 (Nos. 16,567; 16,568; 16,569; and 16,570).

The present motion for new trial, being the fourth motion for new trial and the third such motion based upon allegations of newly discovered evidence, asserts that the defendants have recently acquired information that they and their attorneys were subjected to unlawful surveillance by Government agents by means of wiretapping, electronic eavesdropping, or other intrusions both prior to and during the trial in which they were convicted. The motion is supported by a number of affidavits. The Government responded to the present motion, denying each allegation of surveillance, wiretapping, electronic eavesdropping, or other intrusions upon the defendants' rights and filed a number of affidavits in support of such denials. Upon this state of the record, and as prayed for in the defendants' motion, an evidentiary hearing was ordered by the Court upon the issues of fact raised in the defendants' motion, as amended, and the Government's response thereto. By order entered March 27, 1967, the evidentiary hearing was set to commence upon May 8, 1967. Upon request of the Government and the defendants consenting thereto, the com-

mencement of the evidentiary hearing was delayed to May 9, 1967.

Upon the date of the hearing, May 9, 1967, the defendants each appeared in open court with their respective counsel and moved the Court for a continuance of the evidentiary hearing for a period of 90 days, the motion for continuance being predicated upon the allegation that counsel for the defendants had recently received information which in their opinion made it improper for them to proceed. The nature of the information was not disclosed unto the Court, other than to advise the Court that such information related to the matters in issue in the evidentiary hearing and that counsel did not feel that, as a matter of ethics, they could proceed with the evidentiary hearing, nor did they feel that they could disclose the information under their obligations unto their respective clients. The motion for continuance was thereupon denied.

A motion was then made on behalf of such defendants to be allowed to dismiss the present motion for new trial, such dismissal to be without prejudice to their right to refile the same or any portion thereof. The motion to be allowed to dismiss was based upon the same grounds as stated in support of the motion to continue, and was likewise denied by the Court. Thereupon the defendants were called upon to present any matter or matters or introduce any evidence which they wished to present or introduce in support of their motion for new trial, but they declined to do so, advising the Court that they did not propose to offer any further matters in behalf of the motion for new trial. The Government then moved that the motion for new trial be dismissed, and this motion to dismiss was taken under advisement by the Court. The evidentiary hearing was adjourned upon this state of the record.

The Court is of the opinion that the motion for new trial filed herein under date of February 28, 1967, as

amended upon April 3, 1967, should be denied as to each of the grounds asserted therein. The defendants have failed to establish that their rights were violated in any respect by the Government as alleged in the motion. It is sufficient cause for denial of the motion that the defendants have defaulted in the presentation of any evidence in support of their motion upon the evidentiary hearing. The burden of proof in regard to a motion for new trial upon the ground of newly discovered evidence is of course upon the defendant. Having failed to present any evidence, the defendants herein have failed to carry that burden.

Although no precedent has been cited unto the Court, and none has come to the attention of the Court, wherein a rule was established with respect to what weight, if any, was to be given to affidavits in support of a motion for new trial and where an evidentiary hearing was ordered on the motion and the defendant defaulted in the production of any evidence at the hearing, the Court is of the opinion that the proper rule in this respect is that the affidavit of a witness filed in support of the motion is entitled to no further weight nor consideration after an opportunity has been afforded unto the defendant to produce the witness for examination and cross-examination at an evidentiary hearing and the defendant fails, without reason, to produce the witness. In this regard, see **Glasser v. United States**, 315 U. S. 60, 86 L. ed. 680, 62 S. Ct. 457, reh. den. 315 U. S. 827, 86 L. ed. 1222, 62 S. Ct. 629.

Moreover, even should the affidavits filed herein in support of the motion remain a matter for consideration, they were in each instance specifically and fully denied by counter-affidavits. As stated at 39 **Am. Jur.**, "New Trial," Section 198:

> "To warrant the setting aside of a verdict on a motion for new trial, the evidence should be clear

> and satisfactory. In view of the temptation to obtain a rehearing after an adverse verdict, particularly in a criminal case, and in view also of the facility with which affidavits for this purpose can be obtained, all such evidence should be scrutinized with the greatest care and caution."

Upon the present state of the record there is little, if any, cause for the Court to place credence in the affidavits filed in support of the motion. The action of counsel for the defendants in declining to call the witness when afforded the opportunity to do so would reasonably indicate to the Court that such counsel may have learned of matters in their preparation for the hearing which caused them to be unwilling to further assert or vouch for the truth of the matters set forth in the affidavits filed in support of the motion. Should this be the case, while it would be commendable for counsel to decline presenting matters unto the Court as true when in fact they have no belief in the truth of the matters, it would likewise be regrettable that the investigation leading to this conclusion was not undertaken and completed prior to the filing of the affidavits in the United States Supreme Court and in this court. Upon the present record the Court would accordingly find that no credible evidence has been presented by affidavits or otherwise that any wiretapping, electronic eavesdropping or other unlawful surveillance or intrusion upon the defendants' rights were committed by the Government either prior to or during the course of the trial in which they were convicted.

Finally, and in addition to the foregoing, certain portions of the defendants' motion failed as a matter of law to assert grounds for a new trial. These matters were covered in the order of this Court as entered upon April 26, 1967, wherein the Court defined the scope of the evidentiary hearing and stated its reasons for excluding certain matters from the evidentiary hearing. As there

stated, general allegations of violations of the defendants' rights, unsupported by affidavit or specifications of fact, as well as allegations of wiretapping or eavesdropping upon others, and not shown in any way to relate to the rights of these defendants, are insufficient as a matter of law to support a motion for new trial based upon an allegation of newly discovered evidence.

An order will enter dismissing with prejudice the motion for new trial with respect to each ground thereof.

/s/ Frank W. Wilson,
United States District Judge.

APPENDIX C.

United States Court of Appeals
for the Sixth Circuit.

No. 18,029.

United States of America,
Plaintiff-Appellee,

vs.

James R. Hoffa,
Defendant-Appellant.

Before: O'Sullivan and Celebrezze, Circuit Judges, and Cecil, Senior Circuit Judge.

JUDGMENT—FILED JULY 23, 1968.

Appeal from the United States District Court for the Eastern District of Tennessee.

This Cause came on to be heard on the record from the United States District Court for the Eastern District of Tennessee and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

No costs awarded. Rule 39 (b).

Entered by order of the Court.

Carl W. Reuss,
Clerk.

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United States Court of Appeals
for the Sixth Circuit.

No. 18,030.

United States of America,
Plaintiff-Appellee,

vs.

Thomas Ewing Parks,
Defendant-Appellant.

Before: O'Sullivan and Celebrezze, Circuit Judges, and Cecil, Senior Circuit Judge.

JUDGMENT—FILED JULY 23, 1968.

Appeal from the United States District Court for the Eastern District of Tennessee.

This Cause came on to be heard on the record from the United States District Court for the Eastern District of Tennessee and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

No costs awarded. Rule 39 (b).

Entered by order of the Court.

Carl W. Reuss,
Clerk.

A True Copy.

Attest:

Carl W. Reuss, Clerk.

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Total $

United States Court of Appeals
for the Sixth Circuit.

No. 18,031.

United States of America,
Plaintiff-Appellee,

vs.

Larry Campbell,
Defendant-Appellant.

Before: O'Sullivan and Celebrezze, Circuit Judges, and Cecil, Senior Circuit Judge.

JUDGMENT—FILED JULY 23, 1968.

Appeal from the United States District Court for the Eastern District of Tennessee.

This Cause came on to be heard on the record from the United States District Court for the Eastern District of Tennessee and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

No costs awarded. Rule 39 (b).

Entered by order of the Court.

Carl W. Reuss,
Clerk.

A True Copy.

Attest:

Carl W. Reuss, Clerk.

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Costs:

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SUPREME COURT, U. S.

FILED

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NO. 668

IN THE

Supreme Court of the United States

OCTOBER TERM 1968

JOSEPH STASSI, SR., *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI

WOODY AND ROSEN
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NO._____

IN THE

Supreme Court of the United States

OCTOBER TERM 1968

JOSEPH STASSI, SR., *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI

To The Honorable Chief Justice And The Associate Justices Of The Supreme Court Of The United States:

JOSEPH STASSI, SR., PETITIONER, prays that a Writ of Certiorari be issued to review the Judgment of the United States Court of Appeals for the Fifth Circuit rendered against him on August 29, 1968 and styled "Joseph Stassi, Sr. v. United States of America, No. 24,734". (R. 1409-1424).

CITATIONS TO OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit in the above styled cause is as yet unreported but a copy of said opinion is attached hereto and included herein for all purposes as Appendix "B".

JURISDICTION

The jurisdiction of this Honorable Court is invoked under 28 United States Code, Section 1254(1). The opinion of the United States Court of Appeals for the Fifth Circuit in this cause is in conflict with the Constitution and laws of the United States and the holdings of other United States Courts of Appeals interpreting said Constitution and Laws. The Judgment in this cause became final on August 29, 1968 upon the rendering of the opinion in this cause in the United States Court of Appeals for the Fifth Circuit.

On September 30, 1968, Associate Justice Hugo L. Black ordered an extension of time for the filing of a Writ of Certiorari by Petitioner herein to and including October 21, 1968. A copy of said Order is attached hereto and included herein for all purposes as Appendix "C".

QUESTIONS PRESENTED

FIRST QUESTION

Has the Defendant been denied effective assistance of counsel and right of confrontation and cross-examination protected by the Fifth and Sixth Amendments to the Constitution of the United States, where the Defendant's Federal District Court conviction was secured as follows:

1.) Pre-trial Motion for Production and Inspection of Grand Jury Minutes, was timely made;

2.) The witness had testified before the Grand Jury;

3.) The Grand Jury Minutes were available to the Court and the United States Attorney;

4.) The witness was a key Government witness and testified at trial, and;

5.) Trial Court and Fifth Circuit Court of Appeals held that the Defendant must show *particularized* need for Grand Jury testimony before production is necessary, pursuant to Rule 16 of the Federal Rules of Criminal Procedure?

SECOND QUESTION

Have the Petitioner's Fourth, Fifth and Sixth Amendment rights to be free from unreasonable searches and seizures, rights of confrontation and cross-examination, compulsory process, effective assistance of counsel and due process of law been violated, when:

(1) The Federal Government admitted unlawful electronic eavesdropping and filed logs with the Federal Court of Appeals; and

(2) information reflected in the logs was utilized at both the proceeding, out of which grew the Petitioner's perjury indictment, and perjury conviction; and

(3) the Federal Court of Appeals conducted an *in camera* ex parte inspection and determination of relevancy in lieu of remanding to the Federal District Court for adversary proceedings so that the records of such electronic eavesdropping might be subject to an *in camera* inspection by the trial judge to determine the relevancy of the information obtained through unlawful electronic eavesdropping and the necessity of compelling the Government to make disclosure of such records to Petitioner?

THIRD QUESTION

Does the Government's admission that the Petitioner's Fourth Amendment rights to be free from unreasonable search and seizure have been violated by unlawful electronic eavesdropping require an adversary proceeding in the Federal District Court in order to ascertain whether said violation contributed in any manner directly or indirectly to the Petitioner's conviction in Federal District Court?

FOURTH QUESTION

Can a perjury conviction in Federal District Court be predicated upon testimony taken before a United States Commissioner at a void proceeding?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provisions involved herein are the Fourth, Fifth and Sixth Amendments to the Constitution of the United States. The statutory provisions involved herein are Rules 5(b), 5(c), 9(c)(1), 16(a), 16(b) and 40(b)(3), Federal Rules of Criminal Procedure and Title 18, United States Code, Section 1621. The constitutional and statutory provisions, are set forth in Appendix "A".

STATEMENT OF THE NATURE OF THE CASE

1. PROCEDURAL HISTORY OF THE CASE:

The Petitioner, Joseph Stassi, Sr., was charged by an indictment returned on July 26, 1966, in the United

States District Court for the Southern District of Florida, for a violation of the provisions of Title 18, U.S.C., Section 1621. (R. 12-15).

Petitioner elected to be tried by a jury; pursuant to the Government resting, Petitioner moved, pursuant to Rule 29(a), Federal Rules of Criminal Procedure, for a Judgment of Acquittal, which motion was denied by the Court. (R. 1298). Petitioner did not introduce any evidence, the case was submitted to the jury on January 28, 1967, with a verdict of guilty being returned on February 1, 1967. On April 21, 1967, the Petitioner was sentenced to serve four (4) years in a United States Penal Institution in the custody of the Attorney General of the United States and to pay a fine to the United States in the sum of Two Thousand ($2,000.00) Dollars. Petitioner perfected his appeal to the United States Court of Appeals for the Fifth Circuit, which Court affirmed said conviction on August 29, 1968. (R. 1409-1424). (Appendix B).

2. FACTS MATERIAL TO THE QUESTIONS PRESENTED:

The Petitioner was jointly charged with six (6) other persons with a violation of Title 21, United States Code, Section 174 by an indictment returned on November 1, 1963, in the United States District Court for the Southern District of Texas in cause number 63-C-29. A prior indictment concerning this matter had been returned in cause number 63-C-25 in which the Petitioner had been charged as a co-conspirator but not as a co-defendant. From the approximate date of the return of indictment (63-C-29), on November 1, 1963, until January 25, 1966, the Petitioner was a fugitive and therefore was not tried upon indictment in cause number 63-C-29, until

February of 1967 before the United States District Court for the Southern District of Texas at Corpus Christi.

The evidence introduced at trial consisted of testimony and evidence gathered by the Government through various searches and seizures and the arrest of several co-conspirators who had in their possession twenty-two (22 lbs.) pounds of heroin at the time of their arrest in Houston, Texas, on November 7, 1962. The evidence further reflected that the Government had had information for a substantial period of time prior to November 7, 1962.

Subsequent to the arrest of Petitioner, on January 25, 1966, in the Southern District of Florida, a hearing was had before United States Commissioner, Edward P. Swan, on January 26, 1966, a Commissioner for the United States District Court for the Southern District of Florida, at Miami, Florida, said case being Commissioner's Docket No. 3, cause number 66-746, (R. 12), styled "United States of America v. Joseph Stassi". (R. 185, Government's Exhibit "7").

On the occasion of the hearing on January 26, 1966, before Commissioner Swan, said hearing being in the nature of a removal or identification proceedings conducted post-indictment, after an original bond had been set by the District Court for the Southern District of Texas in the sum of Two Hundred Fifty Thousand ($250,000.00) Dollars.

Subsequent to said hearing the Petitioner was charged by an indictment returned in the United States District Court for the Southern District of Florida, by which the Petitioner was charged with a violation of Title 18, U.S.C., Section 1621, in cause number 66-278-CR-WM which charged the Petitioner with having testified falsely, under oath, to material matters in a Bail Bond hearing before

United States Commissioner Swan. The indictment set forth the following questions and answers before the Commissioner:

"Q. Do you have a United States Passport under the name of a Michael Frank Dorsi—D-O-R-S-I?
A. No, Sir. I got no passport.
Q. You do not?
A. No, sir.
Q. Did you get such a passport?
A. No, I never got a passport.
Q. You never obtained such a passport?
A. No, sir."

* * *

"Q. (By Mr. Bates) Just going back here, as I understand you, you did not obtain or have anything to do with an issuance of a passport in the name of a Michael Frank Dorsi—a U.S. passport F288402, issued April 10, 1965, in Washington, D.C.?
A. No, sir."

* * *

"THE COMMISSIONER:
Let me ask a couple of questions before you make any statement.
Have you ever had a passport?

THE WITNESS:
No, sir.

THE COMMISSIONER:
Do you know anything about the questions asked you by the Government dealing with a passport in Washington, D.C.?

THE WITNESS:
No, sir.

THE COMMISSIONER:
Did you ever pose for any passport pictures?

THE WITNESS:
I have had pictures taken, but I never applied for a passport.

THE COMMISSIONER:
And is it my understanding that you do not have a passport at this time?

THE WITNESS:
Correct." (R. 12-14).

The foregoing testimony was taken by Commissioner Swan in conducting a removal hearing, pursuant to Rule 40(b)(3), Federal Rules of Criminal Procedure, (R. 180-181), upon an oral Motion urged by the Petitioner to reduce the bond set by the Federal District Court of Texas and a hearing for removal. The testimony referred to hereinbefore, which was set forth in the indictment was a portion of the testimony taken at said hearing upon which the indictment for violation of Title 18, U.S.C., Section 1621, was returned.

The specific testimony for which the Petitioner was convicted of a violation of Title 18 U.S.C., Section 1621, was upon the following:

"Q. Do you have a United States passport under the name of a Michael Frank Dorsi—D-o-r-s-i?
A. No, sir. I got no passport.
Q. You do not?
A. No, sir.
Q. Did you get such a passport?
A. No, I never got a passport.
Q. You never obtained such a passport?
A. No, sir."
(R. 190-191).

The hearing before Commissioner Swan was after an indictment had been returned in the United States District

Court for the Southern District of Texas, a Bond was set in Texas, post-indictment, the indictment having been returned in March of 1963, (R. 198), and there was no written motion or other written application before the Commissioner to support the hearing.

A key Government witness was Francis G. Rando, the only Government witness to testify with respect to the vital issue of whether a passport was ever received by the Petitioner. In the course of the trial it came to light that Mr. Rando had testified before the Grand Jury and a request was made for the Grand Jury testimony of said witness. (R. 470, 495). The United States Attorney admitted that said witness had testified before the Grand Jury that returned the indictment and that said testimony had been transcribed and was available and as a matter of fact, the United States Attorney had "no objection to an *in camera* inspection of the Grand Jury testimony." (R. 495-496). The Court refused to conduct an *in camera* inspection and refused to make said Grand Jury testimony available to Attorney for Petitioner, unless a particularized need was shown for the production of said Grand Jury testimony. Attorney for Petitioner pointed out to the Court that without the availability of said witness' testimony, that there was no way to demonstrate a particularized need for said testimony. (R. 496).

On or about July 10, 1968, the United States Attorney for the Southern District of Texas, filed with the Clerk of the United States Court of Appeals for the Fifth Circuit, in cause number 24,734, then pending before the Fifth Circuit, sealed envelopes marked "To Be Opened By The United States Court of Appeals Only", which allegedly contained notes and logs of conversations in which the Petitioner was a participant, which were overheard by

the Government sometime during the year 1962, the Petitioner being identified as Joe Rogers, an alias utilized by the Petitioner. (R. 1422-1423). The name of Joe Rogers was referred to at the hearing before the United States Commissioner, Edward P. Swan, on January 26, 1966, (Government's Exhibit "7"; R. 242, 243, 247).

In the opinion delivered on August 29, 1968, in cause number 24,734, by the United States Court of Appeals for the Fifth Circuit, it appears that the Fifth Circuit made an *in camera* examination of said tendered logs of conversations in which Joe Rogers was a participant, which transpired in 1962, made an ex-parte determination that said logs were too remote in time and were therefore unrelated to the case pending before the Fifth Circuit and did not remand to the trial court for an adversary proceeding in order to determine relevancy and whether any information therein was utilized in the hearing which took place before Commissioner Swan on January 26, 1966, or the trial of the Petitioner for violation of Title 18, U.S.C., Section 1621.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I.

This Honorable Court should grant Certiorari herein to decide the conflict existing between the United States Circuit Court of Appeals in their interpretation and application of *Dennis v. United States,* 384 U.S. 855, 86 S. Ct. 1840. There is a conflict between the United States Circuit Court of Appeals for the Fifth Circuit, reflected in the opinion of the instant cause and the United States Court of Appeals for the Second Circuit, reflected in the

opinion in *United States v. Youngblood,* 379 F.2d 365, (2nd Cir. 1967); and the United States Circuit Court of Appeals for the District of Columbia, *Allen v. United States,* ___ U.S. App. D.C. ___, 390 F.2d 476, (1968); *Gibson v. United States,* ___ U.S. App. D.C. ___, 3 Cr. L. 2489, (1968).

The interpretation hereinabove creates a conflict in the interpretation of Rule 16 of the Federal Rules of Criminal Procedure and the Fifth and Sixth Amendments to the Constitution of the United States. The importance of the application and the conflict of the right of discovery in a criminal proceeding as it is applicable to Rule 16, F.R.C.P. and the interpretation of Rule 16, as amended is of such importance that this Honorable Court should review the conflict and holding of the Court below which required a showing on behalf of the Petitioner for a particularized need for the Grand Jury testimony as a requirement precedent to the production of the Grand Jury testimony, as the holding below is in direct conflict with the holding of other Circuits as hereinbefore demonstrated and enumerated and contrary to Rule 16 (g), F.R.C.P., as amended. The present amendment of the Rule was designed to eliminate discord and conflict over the interpretation of the Rule.

To further demonstrate the conflict in the attitude of the various Circuits, Circuit Judge Waterman, writing the opinion in the case of *Youngblood v. United States,* 379 F.2d 365, 370, enunciates the following procedure to be followed in the Second Circuit:

> "(3) For the foregoing reasons we direct that at trials commencing after our judgment here is entered, the district courts of this circuit at the request

of the defendant should order that the defendant be allowed to examine the grand jury testimony of those witnesses who testify at his trial without requiring him to show any particularized need for this material; we are holding that a defendant should be entitled to see all the grand jury testimony of each witness on the subjects about which that witness testified at the defendant's trial."

II.

This Honorable Court should grant Petitioner's Petition for Writ of Certiorari herein, to determine whether a defendant should be deprived of his Fourth, Fifth and Sixth Amendment rights by refusing to permit a defendant an adversary proceeding in the trial Court in any and all cases where the Government has admitted a violation of the defendant's Fourth Amendment rights by conducting unlawful electronic eavesdropping upon said defendant. This Honorable Court in *Kolod v. United States,* 390 U.S. 136, 19 L.Ed.2d 962, 88 S.Ct. held that the Court would not accept the ex parte determination of the Department of Justice that information secured by unlawful electronic eavesdropping was not relevant in lieu of said determination being made by an adversary hearing in the trial court. The Petitioner realizes that by the time that this Petition is presented that *Kolod v. United States,* is to be re-argued before this Honorable Court and further that *Ivanov v. United States,* 384 F.2d 554 (3rd Cir., 1967), and *Desist v. United States,* ____F.2d____, 2 Cr. L. 2104 (2nd Cir., 1967), are set for argument before this Honorable Court and that the question to be presented to the Court in *Ivanov* concerns a violation of the Petitioner's Fourth Amendment rights being infringed upon by electronic surveillance and whether the records

of such electronic surveillance should be subject to an *in camera* inspection to determine the necessity of the Government disclosing such records to the Petitioner.

The Court is urged to consider the ruling below for the reason that said ruling presupposes that the Fourth, Fifth and Sixth Amendment rights, as reflected in the Rules implementing said constitutional rights, to-wit: Rules 3, 4, 6, 16 and 41, of the Federal Rules of Criminal Procedure may be determined in the absence of counsel and without the necessity of the accused enjoying the guiding hand of counsel at a critical step in his trial. The importance of the right of counsel, as determined by the Court below, is contrary to this Court's interpretation of the right of counsel and the right to enjoy the assistance of counsel, reflected by this Court's opinion in *Gideon v. Wainwright,* 372 U.S. 355; *In Re Gault,* 387 U.S. 1, 18 L.Ed.2d 527, 87 S.Ct. 1428; *Douglas v. California,* 372 U.S. 353, 9 L.Ed.2d 811, 83 S.Ct. 814, reh. den., 373 U.S. 905, 10 L.Ed.2d 200, 83 S.Ct. 1288; *Mempa v. Rhay,* 389 U.S. 128; *Wade v. United States,* 388 U.S. 218; *McConnell v. Rhay; Stillner v. Rhay,* 37 L.W. 3131. To deprive the Petitioner of a plenary determination and representation by counsel, is to ignore the teachings of the Fourth, Fifth and Sixth Amendments to the Constitution of the United States.

III.

This Honorable Court should grant Certiorari and review the interpretation placed upon 18 U.S.C., Section 1621 by the opinion rendered in the instant cause by the United States Court of Appeals for the Fifth Circuit. The conviction in the District Court and the opinion by the

Fifth Circuit in this cause reflect that the Fifth Circuit construes this Statute as being violated on any occasion wherein sworn testimony is taken before an individual authorized to give the oath, and further that the materiality of the testimony to the issues before the judicial officer is not essential.

Further this Court should determine whether the scope and application of Rule 40(b)(3), Federal Rules of Criminal Procedure authorized a United States Commissioner to hold a post-indictment proceeding to reduce bond set by a United States District Judge in a foreign district wherein the indictment was returned and pursuant to such proceeding, testimony was taken which was the basis of the perjury indictment and conviction in the instant cause.

The unconstitutionality of the interpretation of Section 1621 as construed by the Fifth Circuit is demonstrated by the records in this case whereby the Fifth Circuit has affirmed a conviction for perjury, on testimony taken before a United States Commissioner, post-indictment, where the only material, relevant, germane facts to the hearing concerned the identity of the Petitioner. The testimony upon which the Petitioner was convicted was not material to the issue of identification of the Petitioner in that the Petitioner testified that his name was Joe Stassi. He was indicted in the Southern District Court of Texas under the name of Joseph Stassi, alias Joe Rogers. The material, and germane, facts and issues before the Commissioner on a removal proceeding is the identity of the accused. In the testimony elicited before the Commissioner the testimony would be proved, if accepte that the Petitioner was not Joe Rogers, and there

would have resulted in the removal being denied the Government where the Defendant did not make an issue of his identification.

Pursuant to the requirements of Rule 40(b)(3), F.R.C.P., the Commissioner could not have reduced the bond set on the Indictment by the District Judge of the Southern District of Texas. Therefore, the testimony and evidence concerning whether or not Joseph Stassi had previously secured or obtained a passport in some other name was not material nor germane to the factual material issues to be determined by the United States Commissioner.

The uniform test of materiality of false testimony is whether the testimony was capable of influencing the tribunal on the issue before it. *United States v. Icardi,* 140 F. Supp. 383 (U.S. D.C., 1956). The *Icardi* case reflects that before an individual can be convicted of the offense of perjury he must have testified falsely before a competent tribunal acting within the scope of the authority of said tribunal and that the testimony was capable of influencing the tribunal on the issues before it. *Fraser v. United States,* 145 F.2d 145, 149, cert. den., 324 U.S. 842, 65 S.Ct. 586; *Danaher v. United States,* 39 F.2d 325 (8th Cir., 1930).

To sustain a conviction of perjury the false testimony must be given under oath before a competent tribunal, nonetheless it must also have been material to the issues before the tribunal and capable of influencing the tribunal on the issue before it. *Brown v. United States,* 245 F.2d 549 (8th Cir., 1957). In the instant cause, the inquiry was as to whether or not the Petitioner had secured a passport in some name other than his own. This was

not material nor relevant to the issue before the Commissioner. The Commissioner did not have jurisdiction to lower the bond nor to reduce the bond set by the United States District Judge for the Southern District of Texas post-indictment. Therefore, any testimony given on the issue of bond reduction was not capable of influencing the tribunal on that issue due to the fact that the Commissioner did not have jurisdiction or authority to reduce the bond of the District Court. Jurisdiction and relevancy, both as to substance and time, are necessary prerequites as a condition precedent to a conviction for giving such testimony.

The United States Commissioner's authority and function has been a subject of judicial scrutiny throughout history. The most recent legislation concerning the United States Commissioner is reflected in the Federal Magistrates Act which became effective October 15, 1968, and amended Title 28, U.S.C.A., Section 101, Chapter 43.

The minimum requirement to support a conviction for perjury is reflected in *United States v. Cutty*, 39 F. 696 (D.C. Calif., 1889). The averments and proof must support the requirements of jurisdiction, and materiality to-wit: where the false swearing was committed in a proceeding in open court the allegations and proof must show that the matter or proceeding was one in which the court was competent to act. If the court does not have jurisdiction to grant the relief sought, a perjury conviction for testimony taken at such proceeding is void. *Danaher v. United States*, 39 F.2d 325 (8th Cir., 1930).

The effect of the conviction below is to authorize and support a conviction upon the proof of any false swearing in any proceeding where the witness was sworn, regard-

less of the materiality of the testimony to the issue before the tribunal.

CONCLUSION

It is respectfully submitted that this Honorable Court should grant Petitioner's Petition for Writ of Certiorari and reverse and remand said cause to the United States Court of Appeals for the Fifth Circuit for action consistent with the opinion and orders of this Honorable Court so that there will be no curtailment of Petitioner's constitutionally guaranteed rights under the Fourth, Fifth and Sixth Amendments to the Constitution of the United States and Rules 5(b), 5(c), 9(c)(1), 16(a), 16(b) and 40(b)(3), Federal Rules of Criminal Procedure, and Title 18, United States Code, Section 1621.

Respectfully submitted,

WOODY AND ROSEN

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IN THE SUPREME COURT OF THE UNITED STATES ONLY

918 Houston First Savings Building
Houston, Texas 77002
CA 2-9225

CERTIFICATE OF SERVICE

I certify that on this the 18th day of October, A.D., 1968, conformed copies of the foregoing Petition for Writ of Certiorari were served upon the Solicitor General of the United States, Office of the Attorney General, Washington, 25, D. C. and upon the United States Attorney for the Southern District of Florida, Miami Division, 300 N.E. First Avenue, Miami, Florida, by placing copies of same in the United States mail, postage prepaid and affixed, certified, return receipt requested, air mail.

CLYDE W. WOODY

APPENDIX A

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

AMENDMENT (IV.)

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

AMENDMENT (V.)

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT (VI.)

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the wit-

nesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

FEDERAL RULES OF CRIMINAL PROCEDURE

RULE 5.

PROCEEDINGS BEFORE THE COMMISSIONER

(b) *Statement by the Commissioner.* The commissioner shall inform the defendant of the complaint against him and of any affidavit filed therewith, of his right to retain counsel, of his right to request the assignment of counsel if he is unable to obtain counsel, and of his right to have a preliminary examination. He shall also inform the defendant that he is not required to make a statement and that any statement made by him may be used against him. The commissioner shall allow the defendant reasonable time and opportunity to consult counsel and shall admit the defendant to bail as provided in these rules.

(c) *Preliminary Examination.* The defendant shall not be called upon to plead. If the defendant waives preliminary examination, the commissioner shall forthwith hold him to answer in the district court. If the defendant does not waive examination, the commissioner shall hear the evidence within a reasonable time. The defendant may cross-examine witnesses against him and may introduce evidence in his own behalf. If from the evidence it appears to the commissioner that there is probable cause to believe that an offense has been committed and that the defendant has committed it, the commissioner shall forthwith hold him to answer to the district court; other-

wise the commissioner shall discharge him. The commissioner shall admit the defendant to bail as provided in these rules. After concluding the proceeding the commissioner shall transmit forthwith to the clerk of the district court all papers in the proceeding and any bail taken by him.

RULE 9.

WARRANT OR SUMMONS UPON INDICTMENT OR INFORMATION

(c) *Execution or Service; and Return.*

(1.) *Execution or Service.* The warrant shall be executed or the summons served as provided in Rule 4(c)(1), (2) and (3). A summons to a corporation shall be served by delivering a copy to an officer or to a managing or general agent or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the corporation's last known address within the district or at its principal place of business elsewhere in the United States. The officer executing the warrant shall bring the arrested person promptly before the court or, for the purpose of admission to bail, before a commissioner.

RULE 16.

DISCOVERY AND INSPECTION

(a) *Defendant's Statements; Reports of Examinations and Tests; Defendant's Grand Jury Testimony.* Upon motion of a defendant the court may order the attorney for the government to permit the defendant to inspect

and copy or photograph any relevant (1) written or recorded statements or confessions made by the defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government, (2) results or reports of physical or mental examinations, and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government, and (3) recorded testimony of the defendant before a grand jury.

(b) *Other Books, Papers, Documents, Tangible Objects or Places.* Upon motion of a defendant the court may order the attorney for the government to permit the defendant to inspect and copy or photograph books, papers, documents, tangible objects, buildings or places, or copies of portions thereof, which are within the possession, custody or control of the government, upon a showing of materiality to the preparation of his defense and that the request is reasonable. Except as provided in subdivision (a)(2), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by government agents in connection with the investigation or prosecution of the case, or of statements made by government witnesses or prospective government witnesses (other than the defendant) to agents of the government except as provided in 18 U.S.C. §3500.

RULE 40.

COMMITMENT TO ANOTHER DISTRICT: REMOVAL

(b) *Arrest in Distant District.*

(3.) *Hearing; Warrant of Removal or Discharge.* The defendant shall not be called upon to plead. If the defendant waives hearing, the judge shall issue a warrant of removal to the district where the prosecution is pending. If the defendant does not waive hearing, the commissioner or judge shall hear the evidence. If the commissioner hears the evidence he shall report his findings and recommendations to the Judge. At the hearing the defendant may cross-examine witnesses against him and may introduce evidence in his own behalf. If it appears from the commissioner's report or from the evidence adduced before the judge that sufficient ground has been shown for ordering the removal of the defendant, the judge shall issue a warrant of removal to the district where the prosecution is pending. Otherwise he shall discharge the defendant. If the prosecution is by indictment, a warrant of removal shall issue upon proof that the defendant is the person named in the indictment. If the prosecution is by information or complaint, a warrant of removal shall issue upon the production of a certified copy of the information or complaint and upon proof that there is probable cause to believe that the defendant is guilty of the offense charged. If a warrant of removal is issued, the defendant shall be admitted to bail for appearance in the district in which the prosecution is pending in accordance with Rule 46. After a defendant is held for removal or is discharged, the papers in the proceeding and any bail

taken shall be transmitted to the clerk of the district court in which the prosecution is pending.

UNITED STATES CODE

TITLE 18

§1621. Perjury generally

Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall, except as otherwise expressly provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both. This section is applicable whether the statement or subscription is made within or without the United States. June 25, 1948, c645, 62 Stat. 733; Oct. 3, 1964, Pub. L. 88-619, §1, 78 Stat. 995.

APPENDIX B

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 24,734

JOSEPH STASSI, Sr., Appellant,

versus

UNITED STATES OF AMERICA, Appellee.

Appeal from the United States District Court for the Southern District of Florida.

(August 29, 1968)

Before COLEMAN and CLAYTON*, Circuit Judges, and JOHNSON, District Judge.

JOHNSON, District Judge: The appellant, Joseph Stassi, Sr., was convicted for violating Title 18, §1621, United States Code. The indictment was in one count

*The Honorable Claude F. Clayton was a member of the panel hearing the arguments and participating in the decision of this case. The decision of the Court, as reflected by the opinion, was unanimous, but due to the illness of Judge Clayton, occurring subsequent to the arguments and submission, he has not considered this formal opinion.

and charged essentially, that Stassi on January 26, 1966, falsely testified under oath as to a material matter before the United States Commissioner in the Southern District of Florida at Miami. At the time Stassi testified, the commissioner was conducting, at the instance of Stassi and his counsel, an inquiry to determine, among other things, an appropriate amount for an appearance bond, The indictment set forth the following questions and answers before the commissioner:

"'Q. Do you have a United States Passport under the name of a Michael Frank Dorsi—D-O-R-S-I?
A. No, sir. I got no passport.
Q. You do not?
A. No, sir.
Q. Did you get such a passport?
A. No, I never got a passport.
Q. You never obtained such a passport?
A. No, sir?'"

* * *

"'Q. (By Mr. Bates [Asst. U.S. Attorney]) Just going back here, as I understand you, you did not obtain or have anything to do with an issuance of a passport in the name of a Michael Frank Dorsi—a U.S. passport F288402, issued April 10, 1965, in Washington, D.C.?'
A. No, sir."

* * *

"'THE COMMISSIONER:
Let me ask a couple of questions before you make any statement.
Have you ever had a passport?

THE WITNESS:
No, sir.

THE COMMISSIONER:
Do you know anything about the questions asked you by the Government dealing with a passport in Washington, D.C.?

THE WITNESS:
No, sir.

THE COMMISSIONER:
Did you ever pose for any passport pictures?

THE WITNESS:
I have had pictures taken, but I never applied for a passport.

THE COMMISSIONER:
And is it my understanding that you do not have a passport at this time?

THE WITNESS:
Correct.' "

The indictment then charged that, as a matter of fact, Stassi had on April 7, 1965, applied for a United States passport under the name of Michael Frank Dorsi and had obtained such a passport on or about April 10, 1965. After a 22-day trial, Stassi was convicted and, upon the conviction by the jury, was duly sentenced by the District Judge.

Stassi was arrested in the Miami area of the Southern District of Florida in January, 1966, under an arrest warrant based on an indictment that had been returned in Houston, Texas, in March, 1963. As stated, the hearing before the commissioner, during which Stassi testified as

set forth above, was upon Stassi's petition to reduce his bond pending completion of proceedings to remove him from Miami, Florida, to Houston, Texas. Stassi was represented at the hearing before the commissioner by three attorneys of his own choice. There is no question but that the matter of Stassi's having received a passport under the name of Dorsi in 1965 was a matter of material interest to the commissioner with respect to the advisability of reducing Stassi's bond.

The evidence offered by the Government upon the trial for perjury allegedly committed before the commissioner, reflected that an application for a passport in the name of Michael Frank Dorsi was made in person in the office of a naturalization clerk in Hudson County, New Jersey, on April 7, 1965; the application for the passport was signed in three places. Handwriting experts, on the basis of documents known to have been signed by Stassi, testified that Stassi was the person who had signed the passport application. The Government's evidence further reflected that attached to the application for the passport was a photograph identified as being a picture of Stassi, then known to the witness in 1964 as Philip Stazzone. A Government's witness also identified a photograph as being a photograph that had been taken at a studio in West New York, New Jersey, about May 1964, which was identical to the passport photograph. The evidence further reflected that in May or June, 1963, Stassi took up residence in New Jersey under the name of Philip Stazzone. Another witness who knew Stassi under the name of Stazzone identified the Government's photograph as being a picture of the man he knew as Stazzone, but who was, in fact, Stassi. The naturalization clerk did not recognize Stassi at the trial. However, she testified

that the application was signed by the person who appeared and applied for it and that she would not have accepted the application had the appearance of the applicant not coincided with the picture attached thereto. The application for the passport, after being forwarded to the State Department, formed the basis for the issuance of the passport in the name of Michael Frank Dorsi on April 10, 1965. State Department records reflected that it was deposited in the mail on April 14, 1965, addressed to Dorsi in West New York, New Jersey. The passport was not returned or reported undelivered by the United States Post Office Department.

I.

Stassi's first argument on this appeal is directed to the sufficiency of the indictment. The indictment charges that the statements of Stassi were false in that Stassi applied for a passport under the name of Michael Frank Dorsi and had under such name obtained such a passport. It is evident from a reading of the indictment that it meets the standard of Rule 7(c), Federal Rules of Criminal Procedure, as being "a plain, concise and definite written statement of essential facts constituting the offense charged." The indictment tracks the language of the statute, setting forth, as above noted, the material parts of Stassi's testimony in the bail bond hearing in which Stassi denied that he had applied for, obtained, or had anything to do with the passport issued in the name of Michael Frank Dorsi in April, 1965. In his sworn testimony before the commissioner, Stassi unequivocally denied obtaining the Dorsi passport. It is not essential that all the testimony set forth in an indictment be false. As a matter of fact, it is better practice, both from the stand-

point of the Government and the defendant, to set forth enough of the testimony immediately before and after the alleged false statements to give some coherent context to the alleged false statements. Contrary to appellant's argument, more than one allegedly false statement may be set forth in a single count of an indictment. *Arena v. United States,* 226 F.2d 227, cert. denied 350 U.S. 954; *United States v. Otto,* 54 F.2d 277. The trial court, therefore, properly denied Stassi's motion to dismiss the indictment.

II.

Appellant further contends that the evidence upon the trial of the case failed to measure up to the standards required in a perjury prosecution. Appellant argues the "two witness" rule. However, the "two witness" rule is inapplicable where, as was the case here, the Government's evidence of falsity rested predominately on documentary evidence. *United States v. Bergman,* 354 F.2d 931; *Barker v. United States,* 198 F.2d 932. The document itself (the passport) constituted sufficient "direct" evidence to support the conviction.

United States v. Wood, 39 U.S. 430. The Supreme Court in the *Wood* case on this point stated:

> ". . . that circumstances, without any witness, when they exist in documentary or written testimony, may combine to establish the charge of perjury; as they may combine, altogether unaided by oral proof, except the proof of their authenticity, to prove any other fact connected with the declarations of persons, or business of human life. That principle is, that circumstances

> necessarily make up a part of the proofs of human transactions; that such as have been reduced to writing in unequivocal terms, when the writing has been proved to be authentic, cannot be made more certain by evidence *aliunde;* . . ."

Here, not only did the Government's expert witnesses have a group of signatures by appellant in several names, including Stassi, but also had one known signature as "Michael Frank Dorsi." The expert opinions were as directly probative as the typewriting expert testimony held to be sufficient in *United States v. Collins,* 272 F.2d 650, cert. denied, 362 U.S. 911. The general rule on this point in perjury prosecutions requires that the evidence be measured for directness by the yardstick of "whether the evidence is of a quality to assure that a guilty verdict is solidly founded." *United States v. Collins, supra; Hammer v. United States,* 271 U.S. 620; *United States v. Bergman,* 354 F.2d 931. Here, the record is clear that the evidence offered by the Government in the prosecution of this perjury case — both as to handwriting and photograph — "was direct" in the sense required by the rule and this "direct" evidence was further corroborated by the circumstances showing Stassi's use of the name Dorsi in other activities, such as the purchase and trade of Rambler automobiles in New Jersey in 1965. The essence of the charge in this case against Stassi was that he, while under oath, wilfully and falsely denied having anything to do with the application for, the issuance of, or the receipt of a Dorsi passport. The evidence that he did was more than sufficient to withstand the motion for judgment of acquittal.

III.

Stassi requested the following charges be given to the jury:

"Defendant's Requested Instruction No. 6

"You are instructed that in this case the government has the burden of proving by clear, convincing and direct evidence to a moral certainty and beyond a reasonable doubt that the defendant knowingly and intentionally swore to a falsehood. The government's proof must be by substantial evidence excluding to the satisfaction of the jury every other hypothesis than that the defendant in testifying as he did purposefully misstated the fact knowing it to be false and untrue. (quoted from Van Liew v. U.S., 5th Cir., 321 F.2d 674).

"Defendant's Requested Instruction No. 2

"In a prosecution for perjury there must be direct and positive evidence of the alleged falsity of the statement under oath. Circumstantial evidence of such alleged falsity, no matter how persuasive it may seem, is not sufficient. If you find that the government has failed to prove to your satisfaction, by direct and positive evidence, beyond a reasonable doubt the alleged falsity of the defendant's statement under oath, your verdict must be not guilty.

Radomsky v. U.S., 9th Cir., 180 F.2d 781; Sigman v. U.S., 9th Cir., 320 F.2d 176."

Each of these instructions was refused, and this refusal is now the basis for one of appellant's claims of error. The Court's charge, as set forth in the record now presented, reflects that the trial judge actually charged that the falsity of the statements that form the basis for the prosecution had to be established beyond a reasonable doubt by two witnesses or "by a single witness and independent corroborative evidence." In view of the evidence that had been presented, the trial judge properly refused to charge that circumstantial evidence alone is not sufficient to support a perjury conviction. The district judge made it clear that the burden rested upon the Government to prove Stassi guilty beyond a reasonable doubt and that, before the jury could convict upon an indictment that charged perjury within the meaning of Title 18, § 1621, United States Code, the false statement or statements had to have been made with criminal intent and with a specific intent to deceive and had to be made "wilfully, deliberately, knowingly and corruptly. . . ." It was not necessary for the trial judge to tell the jury in addition that the evidence had to exclude every other reasonable hypothesis than that of guilt. *Holland v. United States,* 348 U.S. 121; *Gregory v. United States,* 253 F.2d 104 (5th Cir. 1958). See also: *Movible Offshore Company v. Ousley,* 346 F.2d 870 (5th Cir. 1965).

IV.

Appellant also argues to this Court that the United States Commissioner failed to inform him of his rights as required by Rule 40(b)(2) of the Federal Rules of Criminal Procedure: that he was not required to make any statement and that any statement made by him might be used against him. In this connection, the United States

Commissioner made this statement at the hearing conducted before him in January, 1966:

> "Counsel for the defendant has waived any and all rights that I may advise this defendant as they have advised me that they have fully advised the defendant of all his rights. And being competent counsel, I accept their word."

We are of the opinion that Rule 40 was fully complied with when the commissioner inquired of Stassi's retained counsel in Stassi's presence whether they had fully advised him of all his rights and then received from Stassi's counsel an affirmative answer, accompanied by an express waiver of further warnings by the commissioner. This was a bail hearing convened at Stassi's request. The hearing was not held as a commitment proceeding contemplated in Rules 5 and 40 of the Federal Rules of Criminal Procedure, under which rules the arresting officers must bring the defendant before the commissioner for the protective purpose of advising the defendant of his constitutional rights and ensuring that legal counsel is available. Here, the commissioner's duty was to conduct the bail hearing, as initiated by Stassi and his counsel, and to let Stassi and his counsel conduct his case in such a manner as they considered appropriate. The rule that witnesses who appear before grand juries do not have to be advised of their rights, and the corollary that failure to so advise does not preclude prosecution for perjury before the grand jury, is applicable to appellant's contention. See, *e.g.*, *United States v. Winter*, 348 F.2d 204, cert. denied, 382 U.S. 955; *United States v. Orta*, 253 F.2d 312, cert. denied 357 U.S. 905.

V.

The next point appellant argues relates to the manner in which the jury had been selected in the Southern District of Florida. This point was raised by defendant-appellant through a motion to dismiss the indictment based on an objection to the "array of grand jurors." Basically, the motion, which was denied by the trial judge after a hearing, contended that the jury commission breached its affirmative duty to develop and use a system which would result in a fair cross section of the community being placed on the jury rolls. The evidence taken in connection with this motion reflected that the system of selecting grand jurors in the Southern District of Florida was established in 1962. At that time all the jury boxes were purged, and the intent of the Court's action in ordering the boxes emptied and refilled was to devise an impartial system without regard to any restrictions or exclusions. In the Miami Division (the one we are now concerned with) the clerk, under specific instructions from the district judges, used a comprehensive set of city directories covering urban, suburban and rural areas. The total number of names selected was based on general population figures. For instance, for the February 1965 list, 3,000 names were selected. These names were selected from the directories within alphabetical divisions on an at random basis without regard to occupation, color, race, religion, sex or any other criteria. Questionnaires were sent out to the selected persons for the purpose of obtaining information required in order to determine whether those who had been selected on the at random basis possessed the necessary statutory qualifications. After the questionnaires were returned, the names of these qualified individuals went into a pool comparable, as this Court

understands the procedure, to the master jury wheel required by Public Law 90-274, passed by the Congress of the United States on March 27, 1968. As a matter of fact, the system as followed in the Southern District of Florida in selecting the grand jury that returned the indictment against the appellant in this case was surprisingly similar to the system Congress has now determined should be used in each of the district courts throughout the United States. The system followed in the Southern District of Florida in no way contemplated any conscious effort to include or exclude any person or group of persons based upon personal characteristics, status or circumstances. The district court, its clerk and the jury commissioner had established a nondiscriminatory method of selecting jurors that was designed to and, from the evidence offered in support of the motion to dismiss the indictment based on objections to the array of grand jurors, did represent a fair cross section of the community. Nothing more is required. *Swain v. Alabama,* 380 U.S. 202; *Brooks v. Beto,* 366 F.2d 1; *Mobley v. United States,* 379 F.2d 768, and *Rabinowitz v. United States,* 366 F.2d 34.

VI.

Appellant's final argument is that the trial judge erred in refusing to make available for inspection the grand jury testimony of a United States State Department representative. Defense counsel did timely request that the grand jury testimony of this witness be made available for use on cross-examination. The trial court refused the request. Defense counsel did not, in support of their motion, make any effort to show a particularized need for the disclosure of this grand jury testimony. Instead,

Stassi's counsel stood on the proposition that their client had a right to have his counsel peruse the minutes of the grand jury in search of inconsistencies. *Dennis v. United States,* 384 U.S. 855, relied upon by appellant, did not abolish the requirement, where a motion to inspect grand jury minutes is made, that a showing be made of a particularized need. Since no such showing was made in support of the motion, the trial court was correct in denying same.

VII.

After arguments and the submission of this case, the United States Attorney for the Southern District of Florida filed with the Clerk of this Court sealed envelopes containing copies of certain logs pertaining to electronic surveillance of a person identified as "Joe Rogers," who, according to the Government, "may be identical with appellant Joseph Stassi." As reflected by these logs, these electronic surveillances, and the conversations in which "Joe Rogers" participated, took place in 1962. This action on the part of the Government is undoubtedly precipitated by the *per curiam* opinion of the United States Supreme Court in *Kolod, et al. v. United States,* 390 U.S. 136 (1968). In *Kolod,* a petition for rehearing was filed seeking to have set aside the order of the Supreme Court that denied Kolod's application for the writ of certiorari. The petition for rehearing alleged that Kolod's counsel had been informed after the petition for the writ of certiorari was filed that Kolod's conversations had been monitored through electronic surveillance conducted by a governmental agency. The Supreme Court invited the Solicitor General to respond to the petition for rehearing. The Court interpreted the Solicitor General's response as admitting the electronic surveillance but "justifying nondisclosure

on the basis of the Department's determination that the information obtained was not arguably relevant to this prosecution." The Supreme Court held that, "We cannot accept the Department's *ex parte* determination of relevancy in lieu of such determination in an adversary proceeding in the District Court."

A study of the logs now filed reflect, without question, that the conversations in which "Joe Rogers" participated and were overheard by Government agents are clearly unrelated to the case now before this Court. After an examination of the tendered logs *in camera,* we now make such a determination in lieu of remanding the case to the District Court for that purpose. This procedure has recently been approved by the Seventh Circuit in *United States v. Battaglia* and *Evans* [Nos. 16312 and 16313], April 10, 1968, ____ F. 2d ____. As the Seventh Circuit pointed out in *Battaglia,* it is not unusual for appellate courts "to determine relevancy as a matter of law." This is all the District Judge could do upon remand. Accordingly, there is no purpose to be served in remanding for the purpose of the District Judge's reviewing the logs now filed with the Court. We do, however, direct the Clerk of this Court to reseal the envelopes containing the logs and to make said envelopes a part of the record in this case for use in such other appellate review as may be sought.

We are clear to the conclusion that Stassi received a fair trial, free from substantial error. The case is therefore

AFFIRMED.

APPENDIX C

Supreme Court of the United States

No._____, October Term, 1968

JOSEPH STASSI, SR., Petitioner,

v.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including Oct. 21, 1968.

/s/ Hugo L. Black
Associate Justice of the Supreme Court of the United States

Dated this 30th day
of September, 1968.

SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
NOV 6 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1968

No. 715

FREDERICO G. RANDACCIO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent,

CHARLES CACI, also known as Bobby Milano; STEPHEN A. CINO; PASQUALE A. NATARELLI, a/k/a Pat Natarelli; and LOUIS SORGI,
Defendants-Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

October Term, 1968
No. .....

FREDERICO G. RANDACCIO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent,

CHARLES CACI, also known as Bobby Milano; STEPHEN A. CINO; PASQUALE A. NATARELLI, a/k/a Pat Natarelli; and LOUIS SORGI,

Defendants-Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Frederico G. Randaccio, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on July 30, 1968 which judgment affirmed a judgment of the United States District Court for the Western District of New York entered on a jury verdict convicting defendant of conspiring to commit robbery which would affect commerce in violation of 18 U. S. C. § 1951 and conspiring to transport stolen goods in interstate commerce in violation of 18 U. S. C. §§ 371 and 2314.

(a) Opinions Below

The United States Court of Appeals for the Second Circuit in affirming the judgment of conviction entered in the District Court, wrote an opinion which is not as yet reported, a copy of which is annexed hereto as Appendix "A". The District Court, in denying defendant's motion to dismiss the indictment because the Grand Jury which returned the same was not selected and drawn in compliace with federally madated stadards, wrote an opinion, a copy of which is annexed here to as Appendix "B".

(b) Jurisdiction

(i) The judgment of the Court of Appeals was dated October 8, 1968 and entered on the same day.

(ii) Petitioner moved for a rehearing and a hearing *en banc* by the United States Court of Appeals for the Second Circuit, which motion was denied by order dated and entered October 8, 1968.

(iii) The jurisdiction of the Supreme Court to review the judgment herein by Writ of Certiorari is conferred by Sections 1 and 2 of Article III of the Constitution of the United States; Section 1254(1) of Title 28, U. S. C.; Rule 37(c) of the Federal Rules of Criminal Procedure; and Rule 22(2) of the Rules of the Supreme Court of the United States.

(c) Questions Presented

1. Whether or not the defendant Randaccio whose only defense on the facts was that of an alibi was entitled to have the Court charge on the subject of his alibi defense, especially in the light of a special request embodying a correct instruction on the subject after the Court failed to mention his defense in the course of its main charge.

2. Whether or not there was federal jurisdiction with respect to the conspiracy charged in Count I of the indictment?

3. Whether or not it was error for the trial court to charge the jury that it was not necessary for the government to prove that any of the defendants knew or understood that the carrying out of their plan or conspiracy would affect, delay or obstruct interstate commerce?

4. Whether or not it was error for the Court to charge the jury in substance that they could convict the defendant under Count II if the jury found that the "fencing" of the jewelry proposed to be stolen was to take place in California and some of the money returned to Buffalo?

5. Whether or not the method of obtaining the names of prospective jurors and compiling the jury list utilized by the clerk and commissioner of jurors for the Federal District Court, Western District of New York represents a departure from federally mandated standards?

(d) Statutes Involved

Title 18, U. S. C. § 371:

> "If two or more persons conspire to commit any offense against the United States and one or more of such persons do any act to affect the object of the conspiracy, each person so conspiring shall be guilty of an offense against the United States."

Title 18, U. S. C. § 1951:

> "(a) Whoever in any way or any degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do any-

thing in violations of this section shall be fined not more than $10,000.00 or imprisoned not more than 20 years, or both."

Title 18, U. S. C. § 2314:

"Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000.00 or more, knowing the same to have been stolen, converted or taken by fraud:

"Shall be fined not more than $10,000.00 or imprisoned not more than 10 years or both."

Title 28, U. S. C. § 1867:

"Any citizen of the United States who has attained the age of 21 years and who has resided for a period of one year within the judicial district, is competent to serve as a grand or petit juror unless—

1) He has been convicted in a state or federal court of record of a crime punishable by imprisonment for more than one year and his civil rights have not been restored by pardon or amnesty.

2) He is unable to read, write, speak and understand the English language.

3) He is incapable by reason of mental or physical infirmities to render efficient jury service."

(e) Statement of the Case

Facts

Randaccio appealed from a judgment of conviction in the United States District Court for the Western District of New York adjudging him guilty of the crime of conspiracy to obstruct, delay and affect commerce by robbery in violation of § 1951, Title 18 U. S. C., and the crime of conspiring to transport merchandise, securities or money in interstate commerce, knowing the same to have been stolen in viola-

tion of § 2314, Title 18 U. S. C. The defendant Randaccio was sentenced to twenty years imprisonment on the first count and five years on the second count to run concurretly.

The only evidence connecting Randaccio with the alleged conspiracies charged was the testimony of the accomplice Calabrese. Despite the long record developed at the trial, the testimony concerning the claimed participation of Randaccio was very brief. Calabrese, who had committed numerous armed robberies and other crimes in the City of Buffalo (R. 377 *et seq.*, 450 *et esq.*),* testified that in February of 1965, while he was in hiding after a daylight armed robbery by him of the office of the Treasurer of the City of Buffalo (R. 387), he was invited to the home of the defendant Natarelli at 60 Manchester Place in the City of Buffalo (R. 191). He testified that he was told to be there on a Friday evening "anywhere from seven-thirty to eight o'clock" (R. 191). This was Friday, February 5, 1965.

He testified that he arrived at the appointed place at approximately "Six-thirty or seven-thirty" (R. 191, 193). He said that the defendants Cino and Natarelli were present when he arrived (R. 191). He further testified that Natarelli told him "We got a couple of good scores for you out of town."** Calabrese said that about a half an hour later the appellant Randaccio arrived (R. 194). He said that the four of them then went into another room in the house and that Natarelli told him about "the two scores in Los Angeles".

Assuming to quote the defendant Natarelli, Calabrese testified that Natarelli said, "We got one, a heist right up your alley, and we got one, a jewelry, with a woman coming in with $400,000 worth of jewelry that we want you to

* ("R") refers to record.

** In the parlance of the accomplice Calabrese the word "scores" means robberies.

take'' (R. 195). Asked whether any of the others present said anything Calabrese answered as follows:

> ''Yes. Freddie (Randaccio) told me—I said to Freddie, 'Am I going to do this by myself?' He said, 'No, we'll have Stevie (Cino) coming out in a couple of days to help you out.' He said, 'These two scores, I want you to do the jewelry one first and then take care of the armored truck afterwards.' He said, 'You don't have to worry about anything, all the security is taken care of.' He said, 'We got the connection out there for you.' Then Pat (Natarelli) asked me—he jumped in the conversation—he asked me if I know or remember Louis Sorgi. I said to him, 'Is that the guy that used to work at the Why Not?' '' (R. 195, 196).

The Louis Sorgi mentioned was, of course, the defendant Louis Sorgi who somehow or other had become the chief security officer of the Beverly Hilton Hotel who, according to Calabrese, was to ease his way in connection with both of the proposed robberies (R. 196). The woman referred to was a Mrs. McCune, a frequent guest at the Beverly Hilton Hotel (R. 1094) and the armored truck was a truck which took the day's receipts of the Beverly Hilton Hotel in Los Angeles to the United California Bank for deposit (R. 719).

Calabrese then gave a long and detailed account of his trip to California (R. 201 *et seq.*). Mrs. McCune became ill and did not come to the hotel as allegedly anticipated by the claimed conspirators and neither of the proposed robberies was ever attempted (R. 243-44). The testimony with respect to Calabrese's alleged futile wait for her to check into the hotel and his alleged frustrations constitute a major portion of the record. There is no further testimony on his part affecting the defendant Randaccio.

The defendant Randaccio asserted an alibi defense. Fortuitously for him and through no original intention on the part of the Government to provide the basis for the

same, it did just that. Apparently Randaccio had a friend—a girl friend—whose apartment was bugged in a manner that permitted Government agents to monitor conversations in her apartment and those had over the telephone. Randaccio was heard by the agents to enter her apartment at approximately 7:50 on the evening of February 5, 1965 (R. 1914). Accordingly, it is clear that he entered the apartment at or about the time that Calabrese placed him nine-tenths of a mile away at 60 Manchester Place as a participant in the conversation in which the prosecution claims the conspiracies were hatched.

When the defense learned of the bugging long colloquies took place on the subject of the "electronic logs" (see, for example, R. 1911 *et seq.*). The matter of calling the agents as witnesses—in effect, alibi witnesses for the defense—was discussed with the Court (R. 1911 *et seq.*). The matter of revealing what was overheard and the possible application of § 605 of the Communications Act became a matter of serious concern to the Court. Finally, to obviate the calling of Government witnesses and the legal obstacles and conflicts arising therefrom a stipulation was entered into reading as follows:

> "The government and the defendant, Frederico Randaccio stipulate that on February 5, 1965, a witness, who is not being called to testify, was in a position to overhear, but not see, certain activities in an apartment in the City of Buffalo. That apartment, occupied by a person who is not a defendant in this case, is located approximately nine-tenths of a mile from 60 Manchester Place. At 7:50 P. M. on that evening, Frederico Randaccio was heard arriving at the apartment and talking to the occupant of that apartment. The TV, which had been turned on, was then turned up louder. Continuous loud TV ensued for the balance of the evening, during which no other sound, movement or conversation was heard indicating whether Frederico Randaccio remained or left the premises."

The Witness referred to in the stipulation is not the appellant's girl friend but the Government's agent monitoring the conversation (R. 1913). Importantly, the agent heard Randaccio enter the apartment at 7:50 P. M. on the evening of February 5, 1965 and heard his voice at that time and heard his voice "in the early morning of the day of the 6th" (R. 1914). He heard no conversation in between time for the reason that upon Randaccio's arrival the television was turned up loud and remained so for several hours. This was due to the fact that Randaccio had an incurable ear condition which made it impossible for him to hear the television unless the volume was turned very high (R. 2007-2008).

The accomplice Calabrese, whose sole testimony was offered against the appellant Randaccio, had a long record of armed robberies and other crimes (R. 441 *et seq.*). He laconically stated that he "pulled quite a few stick-ups in the City of Buffalo" in 1960 and 1961 (R. 441). He said he stuck up the gas company (R. 443) and a dairy by the name of Jones-Rich (R. 443). He said that both of these stick-ups were at "gun point" (R. 444). He told in some detail about the Dairylea job where he obtained $10,000 in cash and $20,000 in bonds (R. 444). He admitted a purse snatching where he obtained $100,000 in cash and two diamond rings (R. 445). Apparently in consideration for his testimony he was not prosecuted for any of these crimes.

He walked into the office of the Treasurer of the City of Buffalo in broad daylight on December 29, 1964 with a gun and stole $200,000, terrorizing those present (R. 377). For this crime he was prosecuted and on his trial, according to his own admission, committed extensive perjury (R. 378 *et seq.*). He admitted other robberies, thefts and lies (R. 379 *et seq.*; R. 450 *et seq.*). For the City Hall robbery he

received a sentence of only five years imprisonment (R. 457) and was released on parole after serving two and a half years. Evidently this was in return for aiding the Government.

The facts suggest that his trip to California which he ascribes to the defendants was more likely a flight and concealment on his part for fear of apprehension for the many crimes for which he was wanted.

(f) ARGUMENT

The refusal of the Court below to instruct the jury with respect to the alibi defense of the defendant Randaccio was error requiring reversal and a new trial on both counts.

The affirmance of such refusal is in direct conflict with the decisions of the Third Circuit Court of Appeals on the same matter.

As appears from our statement of facts the defendant Randaccio relied heavily upon an alibi defense based upon a stipulation placing him at a location approximately a mile away from the place where it is claimed that he entered into the conspiracies charged in the two counts of the indictment at the time that the uncorroborated accomplice Calabrese stated that he was present and participated in the formation of the conspiracies. The Court charged the jury without any mention of the alibi defense whatever. Counsel for the defendant Randaccio, prior to the charge, had requested the Court to charge as follows:

> "The defendant, FREDERICO G. RANDACCIO, has raised the defense of alibi in that he has introduced proof by way of a stipulation between himself and the Government that at 7:50 p. m. on the evening of February 5th, 1965 he was at another residence in the City of Buffalo, nine-tenths of a mile away from the place where the al-

leged meeting of the other alleged co-conspirators was to have taken place.

"I charge you that if this proof, when taken into consideration with all the other evidence, raises a reasonable doubt in your mind as to the defendant Randaccio's guilt, then he is entitled to an acquittal."

In *U. S. v. Marcus,* 166 F. 2d 497 (3d Cir. 1947), the Court stated:

> "By the weight of authority it is held that the instructions on the presumption of innocence of the accused, and of the necessity of fastening every necessary element of the crime charged upon the accused beyond a reasonable doubt, *are not enough in cases involving the necessary presence of the accused at a particular time and place, when the accused produces testimony that he was elsewhere at the time. If the accused requests an instruction as to the burden of proof on his alibi, an instruction on the subject must be given so as to acquaint the jury with the law that the government's burden of proof covers the defense of alibi,* as well as all other phases of the case. Proof beyond a reasonable doubt as to the alibi never shifts to the accused who offers it, and if the jury's consideration of the alibi testimony leaves in the jury's mind a reasonable doubt as to the presence of the accused, then the government has not proved the guilt of the accused beyond a reasonable doubt." (166 F. 2d p. 503.) (Italics ours.)

The only affirmative proof offered by the defendant Randaccio on his case was in support of his alibi defense. The stipulation upon which it was predicated was characterized by his counsel in summation as *"the most decisive disclosure of all"* (R. 2212). The prosecutor in the course of his summation said that it is "upon this stipulation that the defendant Frederico Randaccio *sort of put all his eggs in one basket"* (R. 2399). Despite the fact that the alibi constituted the defendant Randaccio's defense it was unmen-

tioned in the Court's charge. When the defendant's counsel through the appropriate request to charge, *supra,* called the same to the Court's attention the Court said:

> "Many of these requests" (including the one with respect to the alibi defense) "seek to take the defendant Randaccio separately and treat, as it is, certain phases of the case against him. Throughout my charge I have studiously tried to avoid discussing facts on one side or another, in other words, avoided marshalling the evidence, because that puts a burden on the Court that is very difficult to fill. If I marshal one side's facts, I must marshal all the facts. Sometimes I think a Court is apt to place greater emphasis on one side than another. In substance, I believe that the principles embodied in these late requests to charge have been charged. I decline to charge in the language chosen. *You have, of course, an exception to my failure to charge.*" (A. 57a)

In the language of the *Marcus* case, *supra,* the charge as given by the Court was "*not enough* in cases involving the necessary presence of the accused at a particular time and place when the accused produced testimony that he was elsewhere at the time". The charge as requested was a correct statement of the law. Indeed, it was less than that to which the defendant was entitled, but if it could be said that the request was in any respect inaccurate even so, it was error for the Court not to charge on the subject. In the *Marcus* case the Court said:

> "We think it" (the requested charge) "clearly states the situation, but even if it did not, since an instruction on the issue was requested, it was the court's duty to itself compose and give a proper instruction on the subject. (Citing cases.) See United States v. Schaerman, 3 Cir., 150 F. 2d 941, at page 946, in which this court said: 'It seems settled that, where a correct proposition of law essential to the proper determination of an issue submitted to a jury is incorporated by the defendant into a requested special instruction, which is

> not given in charge to the jury in substance or in effect or is not covered in the general charge of the court, refusal to give the instruction is reversible error.' (Citing cases.)"

In *U. S. v. Barrasso,* 267 F. 2d 908 (3d Cir. 1959) each of the defendants relied upon an alibi defense. However, the Court proceeded to charge the jury without any mention of the alibi defense whatsoever. When counsel brought the omission to the Court's attention the Court supplemented its charge, stating in substance that if the jury believed the defense that that ended the case. In reversing the Third Circuit said:

> "In thus charging the jury the court omitted altogether the conception and rule that the accused has to do no more than to create in the minds of the jurors a substantial doubt concerning his whereabouts at the time in question. Indeed, the court may well have suggested to the jury that the accused bore the burden of persuasion on the alibi defense when it charged: *'if you believe the testimony as to his being elsewhere* (that alibi) is a perfectly good defense.' (Italics ours.)
>
> "We are not persuaded by the government's argument that all of this was cured by a quite proper and forceful general instruction stating in clear language that throughout the case the burden remains on the government to convince the jury of guilt beyond reasonable doubt." (267 F. 2d at p. 910)

The Court's statement *apropos* of defendant's requests that the same "seeks to take the defendant Randaccio separately and treat, as it is, certain phases of the case against him" was quite correct. That was what counsel was endeavoring to have the Court do. No other defendant had asserted an alibi defense and therefore it was important that this defense on the part of the defendant Randaccio be the subject of an enlightening charge. The defendant Randaccio had a right, as did each defendant, to have the

evidence as to him separately considered just as if he were being tried alone.

It is inconceivable that if the defendant Randaccio was being tried alone that it would not be error for the Court to refuse charge on the subject of his alibi. The Court's refusal to charge as requested aggravated the Court's failure to charge at any time that the evidence as to each defendant should be separately considered. The Court's misconception of the defendant's right in this respect was clearly evidenced by his refusal to charge as requested on the ground that to do so was to treat the defendant Randaccio separately. The long and short of the matter is that this defendant's defense and the burden of proof with respect to the same was unmentioned. The jury was left wholly uninstructed on the subject.* This, we submit, was the plainest of error.

There is and can be no question about the timeliness of defendant's request to charge on the alibi defense. In the first place the defendant would have the right to expect the Court to cover the same in its main charge without specific request. In both the *Marcus* and *Barrasso* cases it was after the Court failed to do so in the main charge that the defendant first called the Court's attention to the failure to cover the subject. In the case at bar the Court made reference to the fact that the request on this subject was included with a few others given to the Court shortly before its charge. It developed, however, that the same had been discussed with the Court late in the afternoon of the day before he charged. The Court did not put its refusal to charge on any basis having to do with timeliness. Indeed, the Court said "My comment about the lateness of the re-

* They undoubtedly believed that the defendant had the burden of establishing his alibi!

quests are not the cardinal problem" and went on to say "I decline to get specific at this time or any other time on this charge". Herein lies the error. The defendant Randaccio was entitled to have the Court charge on this specific subject and prior to the Court's charge posed an appropriate request on the subject.

The judgment of conviction on Count I should be reversed and the count dismissed because there is no federal jurisdiction.

If the uncorroborated testimony of the accomplice Calabrese is to be believed, the defendant conspired to rob the messenger of an armored truck company acting for the Beverly Hilton Hotel in Los Angeles, California transporting a day's receipts to the office of the armored truck company where the receipts would rest overnight and on the next day be transported to the United California Bank for deposit. The Government claims that because the receipts included checks drawn by guests on out-of-state banks they could be said to be moving in interstate commerce *before* they were deposited. Each check bore a restrictive endorsement placed on it by the hotel, "for deposit" (R. 719).

The armored truck company was in the employ of the hotel and the taking of the pouch with the day's receipts from the messenger on his way from the hotel controller's office to the truck would be no different from the robbery of a bellboy on his way to the bank to deposit the same items. Indeed, it would be no different from the robbery of the cashier while going from her cage to the controller's office to put the items in the pouch to be picked up by the messenger, or the robbery of the cashier at her station of duty while the items were residing in her drawer. Such a robbery would seem little different from the robbery of a

guest in the act of paying his bill by a check on an out-of-state bank.

Certainly federal jurisdiction under Section 1951 does not attach every time a citizen or his messenger is robbed on his way to a bank just because he has a check drawn on an out-of-state bank which he intends to deposit with his bank. The robbery of a man on his way to a railroad station or an airport to take a train or plane to another city would not become a federal crime merely because he was carrying money which he intended to spend in another state, or travelers checks which he intended to cash in another state or country. If the contention of the Government can prevail in this case, then almost every robbery and conspiracy to rob would constitute a federal crime. Our argument is that the checks, if there would have been any in the messenger's possession, would not have entered into interstate commerce at the time of the proposed taking of the pouch from the possession of the employee of the hotel's agent trucking compnay.

The Courts have considered the question of when goods can be said to have entered interstate commerce. In *United States v. Fox,* 126 F. 2d 237, 238 (2nd Cir. 1942) the Court said that the goods enter interstate commerce when they have "finally left the shipper's possession and have come into the possession of any of those who are to forward them upon an interstate journey,". Again, in *United States v. Sherman,* 171 F. 2d 619 (2nd Cir. 1948) this Court said:

> "We then made it the test that the goods should leave the possession of the shipper, and come into the custody of someone who without more than inevitable pauses was to pass them along" (171 F. 2d at p. 622).

Applying the "test" of the *Fox* and *Sherman* cases we believe that it becomes clear that the checks had not left the

hotel's possession. The physical possession of the pouch was in the hands of its agent for a specific purpose, delivery to its bank where the cash would be credited and the other items processed. If the hotel be regarded as the "shipper" the goods had not left its possession and if the bank be regarded as the potential shipper the bank would not have even gained possession. On neither theory applying the test of the *Fox* and *Sherman* cases could the checks be said to have entered interstate commerce.

In the *Fox* case the shipper's servant made out a through bill of lading for the goods in question and a "shipping order" and delivered both along with the goods to the servant of the truckman who picked them up in a hand car and took them to the truckman's place of business. Two of the servants of the truckman then put them on a motor truck and with the documents mentioned drove to the freight yard of the Erie Railroad in New York. One of the men took the bill of lading to the receiving clerk who signed it and gave it back to him. Upon his return to the truck he participated in the theft of a carton and delivered it to the accused under circumstances proving his guilty knowledge. Thus, it appears clearly that the possession of the goods had passed to the Erie Railroad Company before the theft. In the *Sherman* case the theft was of certain bales from a truck located on a dock beside a steamship. They were stolen while the driver was in the steamship office securing from the carrier the papers which would evidence his delivery of the bales.

In *United States v. Sherman*, 171 F. 2d 619, this Court observed that "It may be difficult by general proposition to distinguish between the continuous journey of persons and goods" and then quoted from *United States v. Yellow Cab*

Co., 332 U. S. 218, (1947), to the effect that the limits of interstate shipments of goods and chattels may not necessarily be the commonly accepted limits of an individual's interstate journey. Nevertheless, we believe that the reasoning of the Yellow Cab case is pertinent and the following quotations from it apposite:

> "But interstate commerce is an intensely practical concept drawn from the normal and accepted course of business. (Citing cases.) And interstate journeys are to be measured by 'the commonly accepted sense of the transportation concept.'" (citing cases.) 332 U. S. at p. 231.

And further,

> "Here we believe that the common understanding is that a traveler intending to make an interstate rail journey begins his interstate movement when he boards the train at the station and that his journey ends when he disembarks at the station in the city of destination. What happens prior or subsequent to that rail journey, at least in the absence of some special arrangement, is not a constituent part of the interstate movement." 332 U. S. at p. 232.

And further

> "From the standpoints of time and continuity, the taxicab trip may be quite distinct and separate from the interstate journey." 332 U. S. at p. 232.

The alleged conspiracy was to rob the messenger of money (not checks or other items) which money certainly could not be said to be moving in interstate commerce unless upon a theory that all money is destined sooner or later to find its way into interstate commerce. With the federal courts constantly burdened with an ever-growing volume of cases, civil and criminal, it is not in the public interest for federal courts to reach for criminal cases not within

their jurisdiction, merely because a serious offense is charged or because a state prosecution is made more difficult by the requirement of corroboration of an accomplice's testimony, whereas federal prosecution can succeed without such corroboration. The following language of the Court in *Twitchell v. United States*, 313 F. 2d 425 (9th Cir. 1963), is pertinent:

> "And we think that federal courts must be on guard against attempts to convert what are essentially offenses against state laws into federal crimes via the conspiracy route. (See the opinion of Harlan, J., concurring in part and dissenting in part, in Ingram v. United States, 1959, 360 U. S. 672, 683, 79 S. Ct. 1314, 33 L. Ed. 2d 1503; *cf.* Jackson, J., concurring, in Krulewitch v. United States, 1949, 336 U. S. 440, 455-458, 69 S. Ct., 716, 93 L. Ed. 790.) That appears to us to be what happened here" (313 F. 2d at p. 428).

The conviction under Count I should be reversed because the Court erred in charging the jury that it was not necessary under this count for the government to prove that any of the defendants knew or understood that the carrying out of their plan or conspiracy would result in an affect, delay or obstruction of interstate commerce.

Although the indictment charged the defendants with a conspiracy to "obstruct, delay and affect commerce and the movement of mony in commerce", the Court charged the jury as follows:

> "It is not necessary under this count of the indictment that the government establish that any of the defendants knew or *understood* that the carrying out of their plan or conspiracy would result in an affect, delay or obstruction of commerce" (A. 436a).

This was plain error, going to the heart of the case—indeed, to the jurisdiction of the Court. The Supreme

Court of the United States in *Ingram v. United States*, 360 U. S. 672 (1959), quoting from *Direct Sales Co. v. United States*, 319 U. S. 703, 711 (1943), said,

> "Without the knowledge, the intent cannot exist. * * * Furthermore, to establish the intent, *the evidence of knowledge must be clear, not equivocal.* * * * This, because charges of conspiracy are not to be made out by piling inference upon inference, thus fashioning * * * a dragnet to draw in all substantive crimes" (italics ours).

We cheerfully concede that some of the reported cases seem to hold that if the truck had been robbed of items which it was then transporting in interstate commerce that it would make no difference whether the robbers knew or did not know that the truck was transporting checks destined for interstate commerce, but as stated by Judge Learned Hand, in the leading case, *United States v. Crimmins*, 123 F. 2d 271 (2nd Cir. 1941).

> "* * * it does not follow, because a jury might have found him guilty of the substantive offense, that they were justified in finding him guilty of a conspiracy to commit it.
>
> * * *
>
> "While one may, for instance, be guilty of running past a traffic light of whose existence one is ignorant, one cannot be guilty of conspiring to run past such a light, for one cannot agree to run past a light unless one supposes that there is a light to run past" (123 F. 2d at p. 273).

In *Crimmins* the defendant was a lawyer in Syracuse who made a practice of purchasing stolen bonds. He apparently made no inquiry as to the source of the bonds or the place where they were stolen and in the course of time bought bonds that had been stolen outside the state. Reversing a federal conviction, Judge Hand pointed out that

the jury "might have indeed concluded that if he had known that they came from outside the state, it would have made no difference in his conduct; but that is not enough; it would be no more than to say that he would have been willing to make an agreement which in fact he did not make."

The *Crimmins* case has been cited in a long line of cases. In *United States v. Bollenbach,* 147 F. 2d 199 (2nd Cir. 1944), this court said,

> "We shall assume, *arguendo,* as we did in United States v. Crimmins, 2 Cir., 123 F. 2d 271, that it may not be necessary in a prosecution for the substantive crime to prove that an accused, who knows that the securities have been stolen, also knows that they are being moved in interstate commerce. Indeed, we have so decided in the case of receivers of stolen property. Rosen v. United States, 2 Cir., 271 F. 651. But there can be no doubt that such knowledge is necessary to a conviction for conspiring to transport, since no agreement can go beyond the terms of the confederates' mutual understanding" (147 F. 2d at p. 201).

In *United States v. Sherman,* 171 F. 2d 619 (2nd Cir. 1948), the Court stated that it was not necessary for a conviction on a substantive count that the receiver of stolen goods should have known them to be stolen from foreign commerce and then proceeded to state "On the other hand, we held in U. S. v. Crimmins and in U. S. v. Bollenbach that such a scienter is necessary in a prosecution for conspiracy, and their conviction must be reversed on the third (conspiracy) count" (171 F. 2d at pp. 623-624).

In *U. S. v. Varlack,* 225 F. 2d 665 (2nd Cir. 1955), the court considered a case wherein it was claimed that the indictment did not sufficientiy describe the commerce involved. In that case a defendant also complained that the trial judge erred in failing to submit to the jury the question of whether the defendants had conspired to obstruct,

delay or affect commerce. The trial court charged in effect that a conspiracy to obstruct, delay or affect the unloading of raw sugar from an ocean-going vessel at a pier owned and operated by the American Sugar Refining Company in Philadelphia, Pennsylvania was a conspiracy involving interstate commerce as a matter of law. With this holding we have no quarrel because it is obvious that interference with the unloading of an ocean-going vessel would naturally obstruct, delay or affect interstate commerce but such would not be the natural effect of the robbery of one on his way to make a bank deposit. Defendants conspiring to interfere with the unloading of an ocean-going vessel had the requisite knowledge to make them guilty of a federally oriented crime whereas defendants conspiring to rob one on his way to make a bank deposit did not.

The rule requiring "clear proof" of specific federal intent as announced in the cases we have cited is not a mere technicality. It strikes at the very root of the federal system and involves the traditional division of legal powers between the two systems of government ordained by the Constitution. The federal courts have refused to permit the use of the conspiracy charge to fashion "a dragnet to draw in all substantive crimes" without regard to the limitations of federal jurisdiction. *Direct Sales Co. v. U. S., supra,* at p. 711; *U. S. v. Ingram, supra.* The vitality of this principle of law is apparent from the cases—almost all of which involved defendants who were concededly engaged in violations of local law. Any embarrassments or inconveniences which may result to federal officers as a consequence of the application of this principle are "a price we pay for our federalism". *Knapp v. Schweitzer,* 357 U. S. 371, 381 (1958).

The conviction under Count II should be reversed because the Court erred in charging the jury that if it was part of the conspiracy alleged in said count that the stolen jewelry would be "fenced" in California and a "part of the money then returned to Buffalo", then "obtaining cash for that property is viewed merely as a change in the form of stolen property" and that the jury could still find a "planned interstate transportation of stolen property".

Under Count II as well as under Count I we find a reaching for federal jurisdiction. The co-conspirator Calabrese testified that it was part of the plan that the jewelry to be stolen was to be "fenced" in California and a part of the money returned to Buffalo (R. 199). The Court charged on this subject as follows:

> "Pascal Calabrese testified that it was a part of the plan to take the jewelry of Mrs. McCune to a particular point in the State of California where it would be fenced and at least a part of the money then returned to Buffalo. You should understand that in law, the fencing of stolen property and the obtaining of cash for that property is viewed as merely a change in form of the stolen property. Therefore, in the event that you accept this testimony, the fact that it was planned that money rather than the stolen jewelry was to be physically transported in interstate commerce, would not avoid a finding of planned interstate transportation of stolen property".

It is true that the indictment charged that the money to be stolen was also to be transported but there was no proof that the same could or would exceed the statutory sum of $5,000, thus justifying a conviction without reference to the jewelry.

If the Court could be said to be correct in its charge then almost every absconding or itinerant robber, no matter what the subject matter of his theft, would be committing a

federal crime every time he crossed a state border with money in his pocket which could be attributed to a sale or exchange of that which he had stolen.

The question here presented was approached and left open in *United States v. Walker,* 176 F. 2d 564 (2nd Cir. 1949), where travelers checks procured by fraud were cashed and the proceeds transported across state lines. The Court held that under the facts of that case § 2314, Title 18 USCA, was violated but said "*arguendo* we may concede that there are goods, procured by means of the property of the victim, whose transportation is not within the statute" (176 F. 2d at p. 566).

The method for obtaining the names of prospective jurors and compiling the jury list utilized by the Clerk and Commissioner of Jurors for the Federal District Court, Western District of New York, which departed from federally mandated standards, requires the dismissal of the indictment and a reversal of appellant, Randaccio's conviction.

There is presented by this case an important issue involving the selection of jurors to serve in our Federal Courts. The past few years have seen a considerable amount of judicial re-examination of the method used in the Federal Courts for empanelling jurors. This case is a glaring example of how federal requirements designed to obtain jurors which represent a fair cross-section of the community have been ignored resulting in the exclusion of eligible jurors.

To understand the problem requires a review in some detail of the method used for the empanelling of jurors in the Federal District for Western New York.

In the Federal Judicial District for Western New York it is necessary for the Commissioner of Jurors to empanel

about 1,500 jurors annually (R. 26, 28). Over one-half of this annual requirement is fulfilled by resorting to the selection of jurors names from the "Jury Wheel" maintained by the State Commissioner of Jurors for Erie County (R. 22-23). This is accomplished by means of an order signed by the District Court Judge directing the County Commissioner of Jurors to furnish the Clerk of the Federal Court with 750 names of jurors qualified to sit on jury panels in the State of New York (R. 22). The names of these jurors are then placed in the federal jurors' box from which the Grand and Petit jurors were selected in the case of Frederico G. Randaccio (R. 24, 55).

The State Jury Selection System.

The State Commissioner of Jurors for Erie County selects virtually all jurors from the voter registration roles (R. 36; A. 19a). Only two-thirds of those persons over the age of 21 and eligible to vote in Erie County are registered. In some districts the voter registration of eligible voters is as low as 50%. For instance in the Niagara District and the Ellicott District within the City of Buffalo which is predominantly Italian and Negro the voter registration is 56% and 59% respectively.

Therefore, the state's use of voter registration lists to obtain names of jurors automatically excludes at least one-third, and in some districts one-half, of those persons otherwise eligible for jury service.

This group of two-thirds or one-half of all of the eligible persons for jury service obtained through this questionable process is further reduced by several significant state statutes.

Section 662 of the New York State Judiciary law provides, in part, that a juror to be qualified must be:

> "Be of sound mind and good character; of approved integrity; of sound judgment; and able to read and write the English language understandably."

Section 665 of that same law automatically exempts women from jury service.

The Deputy Commissioner of Jurors of Erie County indicated that under these provisions the group of eligible jurors already reduced by one-third is further diminished by about 50%. Therefore, those jurors, qualified by state law, which finally end up in the State Jury Wheel represent only 33⅓ percent of those persons in this community ordinarily eligible for jury service. It is from this emasculated list of jurors that the Federal District Court draws over one-half of its jurors for service in the Federal Court (R. 22).

The consequence of the imposition of these state standards upon otherwise eligible jurors in Erie County results in the exclusion of a large number of women and other persons who is in the judgment of the County Jury Commissioner are not of approved integrity or of good character or sound judgment. As an example the federal census for Erie County for 1966 shows 344,321 women over the age of 21 and presumably eligible for jury service as compared to 307,290 men. Therefore, statistically for every 10 men eligible for jury service in Erie County there should be 11 eligible women. Because of the women's automatic exemption under the state law there are only 20,692 qualified women jurors as compared to 77,071 qualified male jurors in the state jury wheel.

The net effect of this automatic exemption is the creation of a vast disparity between women jurors and male jurors in Erie County. While the federal census for 1966 reveals that there are 11 women eligible for jury service in Erie

County for every 10 men eligible, there is actually only 1 qualified female juror to every 4 qualified male jurors in the Erie County Jury Wheel from which the federal jurors are drawn.

The Federal Jury Selection System for the Western District.

The apparent constitutional deficiencies inherent in these State selection procedures are compounded by the method used by the Federal Jury Commissioner in supplementing this list of names. The Federal Jury Commissioner uses a keyman selection system (R. 39, 49). For instance when he feels that more negroes are needed to balance the panel he calls a prominent negro in the community and explains to him that he would like to have names of "good men and women, fairly intelligent, that would make good jurors * * *" (R. 39).

He then obtains other names generally from two newspapers in Buffalo, selecting those persons who have obtained some prominence in various fields of endeavor (R. 53-54). For instance, he sends out 20 post cards every week based upon names he has observed in either of the two newspapers (R. 54). After he obtains a list of those names questionnaires are filled out by those responding to the postal card request (R. 43). The Commissioner then examines the questionnaire and rejects those who he feels do not have "ordinary sense, ordinary common sense" (R. 43-44). Unidentified personnel in the Clerk's Office participate in this procedure and also make judgments rejecting some jurors (R. 44-46).

It was the use of this mongrel jury selection system, half state and half federal keyman which produced the Grand Jury which indicted the appellant Randaccio and the Petit Jury which convicted him (R. 55).

Recently the United States Court of Appeals for the Fifth Circuit conducted a complete review and analysis of the problem of empanelling juries in the Federal District Courts in the case of *Rabinowitz v. United States,* 366 F. 2d 34 (5th Cir. 1966).

The Rule of Rabinowitz.

The *Rabinowitz* court, in a single decision, formulated a series of rules for the selection of jurors which represent the mandate of Congress.

By amending Section 1861 of Title 28 in conjunction with the 1957 Civil Rights Act, Congress mandated that federal jury qualifications shall no longer be dependent upon the varied state qualifications.

The Federal Commissioner's discretion to establish qualifications not in conformity with the uniform federal standards was abolished.

The decision to exclude or excuse a single juror or groups of jurors rests solely in the hands of the Judge of a District Court.

Where a defendant can demonstrate a departure from federally mandated standards in the selection of jurors, the indictment must be dismissed and the jury venire quashed. Actual prejudice to a particular defendant need not be shown.

In the case at bar this is precisely what the Commissioner has done. By selecting over one-half of the jurors for service in the Western District of New York from the State, the Commissioner has made the selection of Federal jurors dependent upon the qualification for jurors established by New York.

All those persons not registered to vote in Erie County are automatically excluded by the State selection system and are therefore excluded from the Federal system. The same is true of the State's exclusion of women.

A remarkable similarity between the case at bar and *Rabinowitz* is found in the testimony of Commissioner Wisch, the Commissioner of Jurors for the Western District of New York. In relating how he used the keyman system he stated:

> "I tell him that I want some good men and women, fairly intelligent, that he thinks would make good jurors * * * I usually tell them I like to have a juror, when he comes into court and *listens to the charge of the judge, that he will understand it*" (R. 39, Italics ours).

These very standards were specifically condemned in *Rabinowitz* where the Jury Commissioner in that case said essentially the same thing.

> "The jury commissioners in compiling the 1959 list treated the statutory standards a minimum qualification to which they added their own ideas as to good character, intelligence and *ability to 'understand the cases that are tried in court.'* The statutory standards of qualification may not be extended by such broad and vague subjective tests as were employed in compiling the 1959 jury list" (366 F. 2d at p. 51, Emphasis Supplied).

Rabinowitz holds, in unmistakable language that the Jury Commissioner has no discretion to exclude jurors on any grounds other than those set forth in Section 1861.

> "The federal qualifications are objective and precise, requiring in their application *no discretion* on the part of the Court Clerk and the Jury Commissioner. Since Congress only conferred discretion on the Clerk and Commissioner by implication from the State statutes their discretion ceases when the state qualifications

were entirely swept away" (366 F. 2d at p. 54, Italics ours).

In *Ballard v. United States*, 329 U. S. 187 (1946), a case somewhat similar to the case at bar, the United States Supreme Court quashed the jury venire and dismissed the indictment where it was shown that the system for selecting jurors resulted in the exclusion of women.

The *Ballard* court expressed its disapproval in unequivocal terms:

> "We conclude that the purposeful and systematic and intentional exclusion of women from the panel in this case was a departure from the scheme of jury selection which Congress adopted and that, as in the *Thiel* case, we should exercise our power of supervision over the administration of justice in the federal courts, * * *, to correct an error which permeated this proceeding" (329 U. S. at p. 193).
>
> * * *
>
> "* * * The evil lies in the admitted exclusion of an eligible class or group in the community in disregard of the prescribed standards of jury selection. The systematic and intentional exclusion of women, like the exclusion of a racial group, * * *, or an economic or social class, * * * deprives the jury system of the broad base it was designed by Congress to have in our democratic society. It is a departure from the statutory scheme. * * * The injury is not limited to the defendant—there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts" (329 U. S. at p. 195).

The United States District Court for the Southern District of Florida, in *United States v. Hoffa*, 196 F. Supp. 25 (S. D. Fla. 1961), found on facts nearly identical to those of the case at bar, that the method of jury selection adopted by the Commissioner of Jurors violated the mandatory federal standards and dismissed the indictment.

Hoffa demonstrated that the Commissioner deliberately limited his selection of jurors from those persons registered to vote in the State of Florida. In the case of women, only those who had volunteered and were qualified to set as jurors in the State of Florida were selected.

The Court found:

> "Under the said procedure followed by the jury commissioner and the deputy clerk in selecting the names for the jury box, the percentage of qualified citizens deliberately excluded from serving on the jury was extremely high" (196 F. Supp. at p. 29).

The practice of Commissioner Wisch, in the case at bar, of selecting over one-half of the jurors from those qualified to sit in jury panels in the State of New York, results in an identical situation to that in *Hoffa*.

All those persons not registered to vote in Erie County are automatically excluded by the State selection system and are therefore excluded from the Federal system. The only women jurors obtained by the Federal Commissioner are those who "volunteer" by the non-exercise of their State exemption.

As the *Hoffa* court found, the natural consequence of such a system is a Federal Jury which does not represent a "fair cross-section of the community."

> "It is evident that a jury panel from which all were deliberately and systematically excluded who do not register to vote, in a community where many citizens qualified for federal jury service do not so register, and to likewise exclude all women from jury service except the very few who registered for jury service in the state court, is not a fair representation of the community" (196 F. Supp. at p. 31).

Appellant, Randaccio, has been severely restricted in his ability to present to this Court, the detailed factual analysis

found in *Rabinowitz*, of the composition of either jury box, from which the panel of jurors composing the Grand Jury or the Petit Jury was drawn. This can be solely attributed to the denial by the Trial Court of appellant's request to examine records admittedly in the possession of the Commissioner of Jurors or to open and examine the jury box from which the Petit Jurors were drawn.

However, the teaching of these cases is abundantly clear that jury commissioners cannot depart from the well defined Federal standards in qualifying jurors to serve in their districts. Under *Rabinowitz* it is now clear that departure from these standards is *per se* constitutionally impermissible and no prejudice need be shown. In the case at bar surely a *prima facie* case was established demonstrating that the procedures employed resulted in the empanelling of a jury which did not represent a fair cross-section of the community.

Undeniably the procedures employed in the case at bar for empanelling the Grand Jury which indicted and the Petit Jury which convicted the appellant, Randaccio, is clearly at variance with the mandatory standards established by Congress. These distressing departures undoubtedly produced a Grand Jury and Petit Jury which was not representative of the community. But that need not be shown. The failure to comply with the Federal statutes requires a reversal of the judgment of conviction and a dismissal of the indictment.

(g) Conclusion

For the foregoing reasons the petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 511—September Term, 1967.

(Argued June 18, 1968 Decided July 30, 1968.)
Docket No. 32036.

UNITED STATES OF AMERICA,

Appellee,

v.

CHARLES CACI, also known as BOBBY MILANO, STEPHEN A. CINO, PASQUALE A. NATARELLI, also known as PAT NATARELLI, FREDERICO G. RANDACCIO and LOUIS SORGI,

Defendants-Appellants.

Before: MOORE and HAYS, *Circuit Judges,* and TIMBERS, *District Judge.**

Appeals from judgments of the United States District Court for the Western District of New York, John O. Henderson, Chief Judge, entered on a jury verdict convicting appellants of conspiring to commit a robbery which would affect commerce in violation of 18 U. S. C. § 1951 and conspiring to transport stolen goods in interstate commerce in violation of 18 U. S. C. § § 371 and 2314.
Affirmed.

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* Of the District Court for the District of Connecticut, sitting by designation.

Paul Ivan Birzon, Buffalo, New York, for Appellant Caci.

Peter L. Parvino, Buffalo, New York, for Appellant Cino.

Salten Rodenberg, Buffalo, New York, for Appellant Natarelli.

Frank G. Raichle, Buffalo, New York (Herald Price Fahringer, Buffalo, New York, on the brief), for Appellant Randaccio.

Joseph P. Runfola, Buffalo, New York, for Appellant Sorgi.

Andrew F. Phelan, Assistant United States Attorney (Thomas A. Kennelly, Acting United States Attorney for the Western District of New York, Thomas H. Henderson, Jr., and Gary L. Gardner, Attorneys, Department of Justice, on the brief), for Appellee.

HAYS, *Circuit Judge:*

Appellants Charles Caci, Stephen A. Cino, Pasquale A. Natarelli, Frederico G. Randaccio and Louis Sorgi, were convicted, upon a trial by jury, of conspiring to commit a robbery which would affect commerce in violation of 18 U. S. C. § 1951 and conspiring to transport stolen goods in interstate commerce in violation of 18 U. S. C. §§ 371 and 2314. We have considered the many assignments of error which have been advanced by appellants and have found no ground for reversal. The judgments of conviction are affirmed.

The indictment charged in the first count that appellants conspired to rob an armored car messenger at a Los Angeles hotel in violation of 18 U. S. C. § 1951 and in the second count that appellants conspired in violation of 18 U. S. C. § 371 to transport in interstate commerce proceeds from the

sale of jewelry which they planned to steal from a wealthy guest at the hotel. Neither of the planned robberies was executed because the guest did not come to the hotel as expected. But for the decision of Pascal Calabrese, a co-conspirator, to "cooperate" while awaiting sentence on another charge, appellants' plans probably would never have come to the attention of law enforcement officials.

Calabrese, the chief government witness at trial, testified in great detail to the following. On December 29, 1964 Calabrese robbed the Buffalo City Hall of a substantial amount of money and immediately went into hiding. A few days later Stephen Cino contacted him at a Buffalo motel and told him that "Pat" [Natarelli] and "Freddie" [Randaccio] wished to see him. A meeting was arranged for the following evening, February 5, at Natarelli's house. When Calabrese arrived at the house he found Cino and Natarelli already there. They told him that they had "a couple of good scores" for him out of town. About a half hour later Randaccio arrived, and Natarelli and Randaccio explained their plans in detail.

Calabrese was to go to Los Angeles where he would be met by Charles Caci, an entertainer who used the stage name of Bobby Milano. A couple of days later Cino would join them. Caci would introduce Calabrese to Louis Sorgi, who was in charge of security at the Beverly Hilton Hotel. Calabrese would commit two robberies at the hotel. He would rob Mrs. Walker McCune, a frequent guest at the hotel, of her jewelry which was reputed to be worth $400,000. Then he would rob the armored car messenger who visited the hotel to pick up the daily receipts. The jewelry would be taken by Cino to his uncle in San Francisco, who would "fence" it, and the proceeds would be returned to Buffalo.

It was agreed that Calabrese would have some friends drive him to Pittsburgh where he would get a flight to Los Angeles. At the conclusion of the meeting Natarelli and Randaccio gave Calabrese several hundred dollars for expenses.

When Calabrese arrived at the airport in Los Angeles, Caci was there to meet him. While driving from the airport to Caci's apartment they passed the Beverly Hilton, which Caci identified as the site of the "scores." Caci obtained an apartment for Calabrese in the building in which he lived. A few days later, on February 10, Cino arrived. On that evening Caci, Cino and Calabrese went to Sorgi's home where they discussed plans for the robberies. The next day Sorgi took Calabrese on a tour of the Beverly Hilton. They visited the suite usually occupied by Mrs. McCune and made a careful study of the tunnel used by the armored car messenger. Calabrese then left the hotel with Caci and Cino and went over the planned escape route. When they reached Calabrese's apartment, Calabrese commented that it was amazing that Sorgi had the keys to the entire hotel. Caci displayed a key that he said would open all the doors Sorgi had opened at the hotel.

Mrs. McCune was expected to arrive at the hotel on the following day, but she did not. For the next several days Caci telephoned Sorgi frequently to determine whether Mrs. McCune had come. On February 17 Cino received a telephone call from Buffalo and told Calabrese that his, Calabrese's, connection with the City Hall robbery was known to the police and that he, Cino, had been instructed to return to Buffalo lest he be found with Calabrese. Cino then left for Buffalo. Five days after Calabrese surrendered to the authorities in Buffalo.

Calabrese's testimony, only the highlights of which have been summarized here, was corroborated in many details by evidence as to hotel reservations, room rentals, and the like. Evidence that Beverly Hilton passkeys had been found in Caci's possession when he was arrested on another charge provided important support for Calabrese's story.

The government introduced evidence to show that the robbery of the messenger from Armored Transport, Inc. of the pouch containing cash and checks for delivery to the United California Bank would have affected commerce. Hotel records for February, 1965 revealed that fifty-nine percent of the checks cashed at the hotel were drawn on out of state banks. During the same period 1,150 American Express Travelers Checks were cashed at the Hotel. Other evidence indicated that both the bank checks and the travelers checks moved in interstate commerce in the course of collection procedures.

1. Construction of Hobbs Act

Appellants claim that the first count of the indictment should have been dismissed because the Hobbs Act, 18 U. S. C. § 1951, was not intended to cover the kind of robbery they were accused of plotting. Cino contends that Section 1951 applies only to cases of extortion, although Caci is willing to concede that it might apply to "highway" robbery as well. In light of the clear wording of the statute outlawing "robbery or extortion"[1] which affects

[1] 18 U. S. C. § 1951 (1964):
"Interference with commerce by threats or violence.
(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(Footnote continued on following page)

commerce, it is not surprising that appellants spend little time on analysis of the statutory language and place primary reliance on the legislative history. However, as we recently have had occasion to observe, "the proper function of legislative history is to solve and not to create an ambiguity." *United States v. Blasius*, Dkt. No. 32117 (2d Cir. July 8, 1968), slip op. at p. 2992 (citations omitted).

But, in any case, the legislative history does not support appellants' position. The Hobbs Act is the successor to the Anti-Racketeering Act of 1934. Section 2(a) of the 1934 Act in substance made it unlawful to obtain or attempt to obtain money or property by the use of force or threat of force in connection with any act affecting interstate commerce. Specifically excepted from the operation of the section was "the payment of wages by a bona-fide employer to a bona-fide employee." In *United States v. Local 807, Teamsters Union*, 315 U. S. 521 (1942), the Supreme Court read the exception very broadly to include the exaction from out of state truckers by means of threats of violence of payments equivalent to union wages, when the truckers declined to employ members of the local union to drive their trucks on that portion of their routes occurring within the local's territory. The Hobbs Act was passed for the purpose of overruling this

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(Footnote continued from preceding page)

(b) As used in this section—

(1) The term 'robbery' means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

. . . .

This definition of robbery was taken from the definition in the New York State statutes. See 91 Cong. Rec. 11843 (1945) (remarks of Rep. Michener); 91 Cong. Rec. 11906 (1945) (remarks of Rep. Robsion).

case. See H. R. Rep. No. 238, 79th Cong., 2d Sess. (1945), reprinted in U. S. Code Congressional Service pp. 1360-70 (1946). Thus, appellants are undoubtedly correct that the motive of Congress in enacting this legislation was to curb the kind of labor racketeering to which appellants would limit the reach of the statute.

However, the legislative history clearly indicates that Congress deliberately enacted a broad statute designed to apply to *all* robbery and extortion which affected commerce. The Hobbs Act was opposed by many who viewed it as specifically intended to hamper the legitimate activities of organized labor. See, *e.g.*, 91 Cong. Rec. 11848 (1945) (remarks of Rep. Lane); 91 Cong. Rec. 11901 (1945) (remarks of Rep. Celler). In response, supporters of the measure were able to point out that its prohibitions were applicable to all individuals and groups, see, *e.g.*, 91 Cong. Rec. 11844 (1945) (remarks of Reps. Robsion and Michener); 91 Cong. Rec. 11904 (1945) (remarks of Rep. Gwynne); 91 Cong. Rec. 11905 (1945) (remarks of Rep. Robsion), that the activities proscribed—robbery and extortion—traditionally were regarded as criminal under state law, see, *e.g.*, 91 Cong. Rec. 11910 (1945) (remarks of Reps. Springer and Robsion), and that the borrowing of state law definitions in the statute provided assurance that the terms robbery and extortion would not be extended beyond their established meanings, see, *e.g.*, 91 Cong. Rec. 11900 (1945) (remarks of Reps. Hancock and Hobbs). Throughout the debates, advocates of the Hobbs bill sought to characterize it as a traditional criminal statute neutral in its application. So interpreted, the Hobbs Act plainly covers the theft contemplated by appellants.

In *United States v. De Sisto*, 329 F. 2d 929 (2d Cir.), cert. denied, 377 U. S. 979 (1964), we affirmed the conviction

under the Hobbs Act of a defendant guilty of a crime similar to that planned by appellants. De Sisto was accused of hijacking a truck loaded with silk from Japan by means of threats of violence addressed to the driver. No elements of labor racketeering or extortion were in any way present.

Randaccio also argues that the Hobbs Act is inapplicable because checks in the possession of the armored car messenger would not yet have been moving in interstate commerce. This argument is without merit. In the first place, the language in the Act relating to interstate commerce is extremely broad, "manifesting a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery or physical violence." *Stirone v. United States*, 361 U. S. 212, 215 (1960). It is sufficient under the Act that the proposed robbery would "affect" commerce. Furthermore, it is clear that the checks would have begun their journey in interstate commerce at least as soon as they were delivered by the hotel to the employee of Armored Transport, Inc., operator of an independent messenger service. See *United States v. Sherman*, 171 F. 2d 619, 622-23 (2d Cir. 1948), cert. denied *sub nom. Grimaldi v. United States*, 337 U. S. 931 (1949); *United States v. Fox*, 126 F. 2d 237 (2d Cir. 1942).

2. Accomplice Testimony

Appellant Cino attacks the sufficiency of the evidence, apparently on the ground that the uncorroborated testimony of an accomplice is insufficient to support a verdict. Although Calabrese's testimony was of crucial importance, it did not stand alone; as noted above, it was corroborated in several respects. Moreover, even if his testimony were

not corroborated, it would be sufficient to support the convictions. See *Caminetti v. United States,* 242 U. S. 470, 495 (1917); *United States v. Agueci,* 310 F. 2d 817, 833 (2d Cir. 1962), cert. denied, 372 U. S. 959 (1963).

3. Effect on Interstate Commerce

Appellant Natarelli contends that the proof with respect to effect on interstate commerce was insufficient because it was limited to February, 1965 while the robbery of the messenger was not definitely scheduled for that month. However, the evidence clearly establishes that appellants intended to execute this robbery in February. The messenger was to be robbed shortly after the theft of Mrs. McCune's jewelry; Mrs. McCune was to be robbed shortly after she arrived at the hotel. And Mrs. McCune was expected to arrive on or before February 12.

4. Knowledge of Transportation in Interstate Commerce

Appellant Caci argues that there was no evidence from which the jury could conclude that he knew that the proceeds of the jewel theft were to be transported in interstate commerce. We find ample evidence from which the jury could draw this inference. Caci was intimately involved in the preparations for the theft and this fact alone provides sufficient basis for inferring that he knew how the proceeds would be disposed of. Caci knew that Randaccio and Natarelli were directing the operation from Buffalo; he must have known that they would receive their share in Buffalo.

5. Charge on Defense of Alibi

Randaccio claims that the trial court erred in refusing his request for a charge as to the burden of proof on his

alibi defense. We hold that, in the circumstances of this case, the failure to give the charge requested did not constitute reversible error.

The basis of the alibi defense was provided by information in government electronic surveillance logs as to Randaccio's whereabouts on the night of the alleged meeting at Natarelli's house. This information was transmitted to the jury in the form of the following stipulation:

"The government and the defendant, Frederico Randaccio stipulate that on February 5, 1965, a witness, who is not being called to testify, was in a position to overhear, but not see, certain activities in an apartment in the City of Buffalo. That apartment, occupied by a person who is not a defendant in this case, is located approximately nine-tenths of a mile from 60 Manchester Place [Natarelli's address]. At 7:50 P. M. on that evening, Frederico Randaccio was heard arriving at the apartment and talking to the occupant of that apartment. The TV, which had been turned on, was then turned up louder. Continuous loud TV ensued for the balance of the evening, during which no other sound, movement or conversation was heard indicating whether Frederico Randaccio remained or left the premises." There was also evidence that Randaccio suffered from a hearing defect the victims of which frequently turn up the volume when watching television.

Trial counsel for Randaccio sought an instruction indicating in substance that if the alibi proof when considered with the other evidence raised a reasonable doubt as to his guilt, Randaccio would be entitled to an acquittal. Apparently it was thought that such an instruction would prevent the jury from erroneously believing that the burden of establishing the alibi defense was on the defend-

ant. However, both the manner in which this request was made and the manner of objecting to its denial gave the trial court little opportunity for the reflection and deliberation which compliance with the provisions of Fed. R. Crim. P. 30 is designed to provide.

Rule 30 requires that written requests to charge be filed at the close of the evidence "or at such earlier time during the trial as the court reasonably directs." In accordance with the trial court's instructions, counsel submitted requests in advance, including twenty-five requests on Randaccio's behalf. The trial judge informed counsel of his disposition of the requests four days before he was to charge. At that time trial counsel for Randaccio indicated that he was preparing supplemental requests which would be ready later that day. The judge stated that he wished to have them as soon as possible. The additional requests were not presented until fifteen minutes before the judge began delivering his charge. At that late hour, see *United States v. Olweiss,* 138 F. 2d 798, 800 (2d Cir. 1943), motion for leave to file a petition for certiorari *nunc pro tunc* denied, 321 U. S. 744 (1944), counsel submitted four additional requests, of which the alibi request was the second.

Having given the court only the barest opportunity to consider the alibi request in advance, counsel compounded the delict by inadequately objecting to the failure to charge as requested. Rule 30 requires that counsel state "distinctly the matter to which he objects and the grounds of his objection." At the conclusion of his charge the trial judge gave the reasons for his refusal to charge the additional requests and stated, "You have, of course, an exception." Counsel presented detailed objections to other portions of the charge, but made no mention of the alibi request.

Ordinarily the failure to give an instruction on alibi defense will not be considered absent a proper request. See *United States v. Tramaglino,* 197 F. 2d 928, 932 (2d Cir.), cert. denied, 344 U. S. 864 (1952); *Goldsby v. United States,* 160 U. S. 70, 77 (1895). Assuming that in some circumstances the failure to give such a charge might constitute "plain error," see Fed. R. Crim. P. 52(a), this is hardly such a case. The alibi offered was far from compelling. Calabrese's testimony indicated that Randaccio arrived at Natarelli's place at about 8:30 or 9:00 p. m. There is nothing in Calabrese's story which is inconsistent with Randaccio's being nine-tenths of a mile away at 7:50. Under these circumstances, the court's comprehensive charge on reasonable doubt, which included the statement that the burden of proof "rests with the Government at all times" and "never shifts to a defendant," was adequate.

6. Evidentiary Rulings

Caci contends that the admission of evidence to show that certain of his recent checks had been returned for insufficient funds was prejudicial as showing the commission of other crimes. We hold that the evidence was admissible to rebut evidence of Caci's good character. Although no character witnesses were presented, Caci's counsel cross examined Calabrese about Caci's appearances on popular television shows and introduced a brochure which included a photograph of Caci in the company of a well-known entertainer. The bad check evidence also tended to show that Caci lacked funds and thus had a motive to participate in the planned thefts. This has particular significance in view of the testimony from which the jury might have gathered that Caci was a highly paid entertainer. Finally, it is difficult to see how this evidence could have seriously prejudiced

Caci, particularly since the evidence also showed that the checks subsequently had been redeposited and paid.

Caci also argues that the Beverly Hilton passkeys found in his motel room were seized in violation of his fourth amendment rights and should not have been admitted into evidence. His argument seems to be that the trial court erred in crediting the government's witness who stated that Caci voluntarily admitted the police officers to the room rather than crediting Caci's witnesses who testified that the officers broke down the door. Of course we are in no position to contradict the trial judge's determinations as to the credibility of witnesses whom we have not seen. See *United States v. Vita*, 294 F. 2d 524, 528 (2d Cir. 1961), cert. denied, 369 U. S. 823 (1962).

It is also claimed that the officers learned of the keys through interception in violation of 18 U. S. C. § 605 of a telephone conversation between one Fitzgerald and appellant, Sorgi. Since Fitzgerald, the caller, gave the officers permission to listen in on the conversation, there was no violation of Section 605. See *Rathbun v. United States*, 355 U. S. 107 (1957).

Natarelli claims that evidence that the robbery would obstruct the interstate movement of checks was inadmissible under *Stirone v. United States*, 361 U. S. 212 (1960), because the indictment charged only that the robbery would obstruct the interstate movement of money. The claim is frivolous.

7. Jury Selection

Randaccio objects to several features of the jury selection process in the Western District of New York. About one-half of the names for the federal jury box are obtained

from state jury lists. Concerning the prospective jurors so obtained, Randaccio has two objections: (1) the primary sources used by the state jury selectors are voter registration lists, so that non-voters are under-represented, and (2) New York law permits women to claim exemption from jury service, so that women are under-represented. Neither of these objections is substantial. It is well established that the use of voter registration lists as the source of names of prospective jurors is not unlawful because it results in the exclusion of non-voters. See, *e.g., United States v. Kelly*, 349 F. 2d 720, 778 (2d Cir. 1965), cert. denied, 384 U. S. 947 (1966); *United States v. Agueci*, 310 F. 2d 817, 833-34 (2d Cir. 1962), cert. denied, 372 U. S. 959 (1963). Indeed, voter registration lists are made the primary source of jurors in the new Jury Selection and Service Act of 1968, 18 U. S. C. A. §§ 1861-71 (Supp. July, 1968.) As to the representation of women, it is significant that three women served on the jury which convicted appellants. Since only one-half of the federal jurors are taken from the state lists and since women are represented in substantial (albeit unequal) numbers on the state lists, the under-representation of women on the federal juries is minimal. We note also that the constitutionality of the New York statute permitting women to claim exemption has been sustained. *Fay v. New York*, 332 U. S. 261, 277-78 (1947). See also *Hoyt v. Florida*, 368 U. S. 57 (1961).

One-half of the names in the federal jury box in the Western District are selected by a federal jury commissioner using a variety of methods, including the "key-man" system. As to these, Randaccio complains that the commissioner has no authority to reject jurors as unqualified except on the grounds set forth in 28 U. S. C. § 1861 (1964). The jury commissioner testified that he did not place in the jury box the names of persons whose answers to a

questionnaire indicated that they were of low mentality. It is arguable that Section 1861(3) specifically authorizes the commissioner to reject such persons as "incapable, by reason of mental . . . infirmities to render efficient jury service." In any event, it is settled in this Circuit that a jury commissioner has discretion under 28 U. S. C. § 1864 (1964) to reject prospective jurors as not "qualified" for reasons other than those listed in Section 1861. See *United States v. Flynn*, 216 F. 2d 354, 386-88 (2d Cir. 1954), cert. denied, 348 U. S. 909 (1955).

8. Motion for Severance

Caci's motion under Fed. R. Crim. P. 14 for a severance in order that he might have the benefit of Sorgi's testimony in his behalf and his alternative motion for permission to inform the jury that he had attempted to call Sorgi as a witness were both properly denied. As to the former, "The argument is unrealistic. There is no reason to think that a co-defendant would be any more willing to waive his constitutional privilege against self-incrimination when called as a witness at a separate trial than he would be willing not to insist upon his privilege as a defendant not to take the stand." *Gorin v. United States*, 313 F. 2d 641, 645-46 (1st Cir.), cert. denied, 374 U. S. 829 (1963). And had counsel for Caci been permitted to comment on Sorgi's refusal to take the stand, Sorgi's rights under the fifth amendment would have been violated. See, *e.g.*, *United States v. Echeles*, 352 F. 2d 892, 898 (7th Cir. 1965); *De Luna v. United States*, 308 F. 2d 140 (5th Cir. 1962), petition for rehearing denied, 324 F. 2d 375 (1963). We are aware that these cases also appear to hold that the inability of a defendant to comment on a co-defendant's refusal to take the stand in a joint trial is sufficient to require a severance. Subsequent cases, however, have read *De*

Luna and *Echeles* narrowly, confining their application to cases in which a defendant can show "real prejudice" if he is not permitted to comment on the silence of a co-defendant. *United States v. Kahn*, 381 F. 2d 824, 840 (7th Cir.), cert. denied, 389 U. S. 1015 (1967). See *Smith v. United States*, 385 F. 2d 34, 37-38 (5th Cir. 1967); *Kolod v. United States*, 371 F. 2d 983, 990-91 (10th Cir. 1967), vacated on other grounds, 390 U. S. 136 (1968); *Hayes v. United States*, 329 F. 2d 209, 221-22 (8th Cir.), cert. denied sub nom. *Bennett v. United States*, 377 U. S. 980 (1964). See also *United States v. McKinney*, 379 F. 2d 259, 264-65 (6th Cir. 1967). No such prejudice has been shown here.

9. Other points

The remaining contentions do not require extended comment.

a. Natarelli's claim that the second count should have been dismissed because one cannot be guilty of conspiring to transport stolen goods "Knowing them to have been stolen" under 18 U. S. C. § 2314 until the goods have in fact been stolen is without merit. *Cf. Williamson v. United States*, 207 U. S. 425, 446-47 (1908).

b. Since no objection was taken below we do not consider Cino's argument that he was deprived of his constitutional right to be present at every stage of his trial by the holding of numerous conferences in his absence in the judge's chambers. *United States v. Indiviglio*, 352 F. 2d 276 (2d Cir. 1965) (*en banc*), cert. denied, 383 U. S. 907 (1966).

c. Caci contends that the district court erred in refusing to recall the jurors seven days after the verdict to learn whether any of them had heard and had been influenced by radio broadcasts on the evening prior to and on the morn-

ing of the charge referring to three of the defendants as having been linked to the Cosa Nostra. In view of the limited character of the publicity and the repeated and detailed admonitions by the court to the jury to refrain from listening to the radio, the court did not abuse its discretion in refusing to recall the jury. *Cf. United States v. Hoffa*, 367 F. 2d 698, 715 (7th Cir. 1966), vacated on other grounds, 387 U. S. 231 (1967).

d. Finally, appellants raise three objections to the jury charge, none of which we find to have merit.

The court charged with respect to accomplice testimony as follows: "such testimony is to be given close and searching scrutiny and is to be received with caution and weighed with great care. You should not convict a defendant on the unsupported testimony of an accomplice unless you believe the unsupported testimony beyond all reasonable doubts." Far from being inadequate, this charge was more favorable to appellants than was required. See *United States v. Mattio*, 388 F. 2d 368 (2d Cir. 1968).

The court did not err in instructing the jury that a change in the form of the stolen property was not fatal in a prosecution for interstate transportation under 18 U. S. C. § 2314. See *United States v. Walker*, 176 F. 2d 564, 566 (2d Cir.), cert. denied, 338 U. S. 891 (1949).

The instruction that the defendants need not have intended to affect commerce in order to be guilty was entirely correct. See *Nick v. United States*, 122 F. 2d 660, 673 (8th Cir.), cert. denied, 314 U. S. 687 (1941), cited with approval in *United States v. Varlack*, 225 F. 2d 665, 672 (2d Cir. 1955). See also *United States v. Pranno*, 385 F. 2d 387, 389-90 (7th Cir. 1967), cert. denied, 390 U. S. 944 (1968).

Affirmed.

APPENDIX B

Opinion of Henderson, D. J.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

THE UNITED STATES OF AMERICA,
vs.
FREDERICO RANDACCIO, *et al.*

Cr. 1967—115.

The defendant, Frederico Randaccio, has filed a motion to dismiss the indictment and to quash the jury venire impanelled in the above case. The motion is based on the manner in which the grand and petit jurors are selected in this district.

The Court is satisfied from its review that the jury system in the Western District of New York as a whole does not discriminate against any identifiable ethnic, racial, social or economic group and, therefore, is constitutional. See *United States v. Bowe,* 360 F. 2d 1, 7 (2d Cir. 1966); *United States v. Agueci,* 310 F. 2d 817, 833-834 (2d Cir. 1963), *cert. denied,* 372 U. S. 959 (1963).

The defendant seeks time to review the entire list of names on the jury venire in the hope that he might be able to establish some form of discrimination. This request is denied on authority of *United States v. Bowe, supra.* However, further brief comment is in order. In December of 1966, an article appeared in the Harvard Law

Review (Vol. 80 #2) which discussed the application of statistical decision theory to jury discrimination cases. It is a scholarly article and attracted sufficient attention to be included in a footnote to a recent Supreme Court case on this subject.[1] From a reading of this article, however, one should not be led to believe that discrimination necessarily can be established through application of statistical formulas and that review of the venire to that end, therefore, is always in order. Statistically improbable results in terms of the composition of the community obviously may be the result, not of discrimination but of the small size of the sample and the less than perfect sources for sampling which are available. Resolution of such underlying problems, of course, would require far greater manpower and huge expenditures of money, both of which are not presently available. The extent to which such effort, in pursuit of a perfect system, is warranted, is very much open to question.

The motion is denied.

So ordered.

Dated: October 24, 1967.

/s/ JOHN O. HENDERSON,
United States District Judge.

[1] Whitus v. Georgia, 385 U. S. 545, 552 (1967).

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirtieth day of July, one thousand nine hundred and sixty-eight.

Present: Hon. Leonard P. Moore,
Hon. Paul R. Hays, *Circuit Judges,*
Hon. William H. Timbers, *District Judge.*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

CHARLES CACI, a/k/a Bobby Milano; STEPHEN A. CINO; PASQUALE A. NATARELLI, a/k/a Pat Natarelli; FREDERICO G. RANDACCIO; and LOUIS SORGI,
Defendants-Appellants.

Appeal from the United States District Court for the Western District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Western District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed.

A. DANIEL FUSARO,
Clerk,

By VINCENT A. CARLIN,
Chief Deputy Clerk.

Appendix D.

A true copy,
A. Daniel Fusaro,
Clerk.

APPENDIX D

32036

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

CHARLES CACI, also known as Bobby Milano; STEPHEN A. CINO; PASQUALE A. NATARELLI, a/k/a Pat Natarelli; FREDERICO G. RANDACCIO; and LOUIS SORGI,
Defendants-Appellants.

A petition for a rehearing having been filed hereby by counsel for the appellant Frederico G. Randaccio,

Upon consideration thereof, it is

ORDERED that said petition be and it hereby is denied.

s/ LEONARD P. MOORE,
s/ PAUL R. HAYS,
U. S. C. JJ.

s/ WM. H. TIMBERS,
U. S. D. J.

October 8, 1968.

Office-Supreme Court, U.S.
FILED
JAN 3 1969
JOHN F. DAVIS, CLERK

No. 895

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

JAMES R. HOFFA, ZACHARY A. STRATE, JR., S. GEORGE BURRIS, ABE I. WEINBLATT, and CALVIN KOVENS,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

NO.

JAMES R. HOFFA, ZACHARY A. STRATE, JR., S. GEORGE BURRIS, ABE I. WEINBLATT, and CALVIN KOVENS,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this cause on August 15, 1968.

OPINIONS BELOW

The majority and dissenting opinions of the Court of Appeals on the earlier appeal of this cause are reported at 367 F. 2d 698 and are printed as Appendix A, *infra*. The District Court's opinion on remand by this Court is reported at 273 F. Supp. 141 and is printed as Appendix E, *infra*. The majority and dissenting opinions of the Court of Appeals on the instant appeal are not yet reported, but are printed as Appendix F, *infra*.

JURISDICTION

The judgment of the Court of Appeals (Appendix G, *infra*) was entered on August 15, 1968. A timely petition for rehearing was denied on November 7, 1968 (Appendix H, *infra*). On November 26, 1968, Mr. Chief Justice Warren extended the time for the filing of a petition for a writ of certiorari to January 6, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

I. Can a criminal conviction stand where the government gains knowledge of a proposed defense by illegally eavesdropping on the conversation of a defendant and thereafter tailors its evidence to destroy such defense?

II. May the government, through an intentional concealment of the existence of certain relevant documents from the Court as well as the defense, unilaterally usurp the Court's function of determining whether the documents are producible under 18 U.S.C. § 3500?

III. Are the principles of *Brady* v. *Maryland* violated by the Court's holding that governmental suppression of evidence favorable to the defense is permissible so long as the government does not use such evidence at the trial and such evidence does not lead to any other evidence which is used at the trial?

IV. Where the government has illegally eavesdropped on conversations of an accused, is a mere *prima facie*

showing the standard for determining whether the government has met its burden of proving such illegality did not taint the conviction, or is the proper standard, beyond a reasonable doubt under the principles of *Chapman* v. *California*?

V. Is the defense entitled to examine the contents of the government's illegal overhearings of the accused, or may the trial Court determine *in camera* the relevance of such overhearings to the convictions?

VI. Are an accused's fifth and sixth amendment rights violated by the government's admitted illegal eavesdropping upon conversations of defense counsel and upon defense investigators; and, may the government withhold such overhearings from the accused and the trial Court?

VII. Is the application of Rule 27 Fed.R.Crim.P., violative of the confrontation clause of the sixth amendment where, as here, proof by affidavit is permitted to show the non-existence of additional illegal eavesdroppings on defendants' conversations?

VIII. Can criminal convictions stand where a trial judge communicates with a deliberating jury in the absence of petitioners and their counsel especially where there has been no showing that these communications were not prejudicial to the petitioners?

IX. Can mail and wire fraud convictions stand where, irrespective of the good faith of the accused, the jury is instructed that one using a position of trust to obtain benefits thereby is performing an active fraud punishable by the criminal statute?

X. Can a fair trial be preserved through the use of a cautionary instruction directing the jury to disregard incriminating evidence previously held admissible against one defendant in a joint trial but which evidence is subsequently excluded as to all defendants because of its highly prejudicial and inflammatory content?

XI. Was it error for the trial Court to refuse to make inquiry of the jury where it was shown that before jury deliberations: a) highly prejudicial newspaper statements pertaining to the denial of motions for acquittal, and the content of evidence excluded at trial as too prejudicial, reached the sequestered jury; and b) some jurors made many prejudicial statements to other jurors?

XII. Was it reversible error for the trial judge to deny petitioners a severance from a co-defendant, whose irrational conduct during the trial caused irreparable prejudice, and at a minimum, should the trial judge have ordered a mental examination of such co-defendant?

XIII. Is an accused's effective right to testify on his own behalf precluded by his impeachment through the use of a non-final conviction for a subsequent, unrelated, but highly prejudicial offense?

XIV. Are rules 24(c), F.R.Cr.P., and 28 U.S.C. § 1861 violated by removing a juror immediately before commencement of deliberations without ascertaining whether the juror has become unable or disqualified to perform his duties?

XV. In a joint conspiracy trial, is it prejudicial error to admit evidence of many transactions which do not relate to the common object of an alleged scheme and conspiracy, such transactions being either wholly irrelevant or tending to prove separate and multiple schemes and conspiracies?

XVI. Should this Court reverse a conviction where the District Court has failed to hold the full adversary hearing directed by the opinion of this Court for development and consideration of the effect of eavesdropping upon the conviction?

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

Fourth Amendment, Constitution of the United States, provides in pertinent part:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated * * *."

Fifth Amendment, Constitution of the United States, provides in pertinent part:

> "No person shall be * * * compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law * * *."

Sixth Amendment, Constitution of the United States, provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, * * * to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of counsel for his defense."

Section 4244, Title 18, United States Code, provides in pertinent part:

> "Whenever * * * the United States Attorney has reasonable cause to believe that a person charged with an offense against the United States may be presently insane or otherwise so mentally incompetent as to be unable to understand the proceedings against him or properly to assist in his own defense, he shall file a motion for a judicial determination of such mental competency of the accused, setting forth the ground for such belief with the trial court in which proceedings are pending. Upon such a motion or upon a similar motion in behalf of the accused, or upon its own motion, the court shall cause the accused * * * to be examined as to his mental condition by at least one qualified psychiatrist, who shall report to the court.

> * * * If the report of the psychiatrist indicates a state of present insanity or such mental incompetency in the accused, the court shall hold a hearing, upon due notice, at which evidence as to the mental condition of the accused may be submitted, including that of the reporting psychiatrist, and make a finding with respect thereto. * * *"

Section 1861, Title 28, United States Code, provides in pertinent part:

> "Any citizen of the United States who has attained the age of twenty-one years and who has resided for a period of one year within the judicial district, is competent to serve as a grand or petit juror unless—
>
> * * *
>
> (3) He is incapable, by reason of mental or physical infirmities to render efficient jury service."

Rule 8, Federal Rules of Criminal Procedure, provides:

> "Rule 8. Joinder of Offenses and of Defendants.
>
> (a) JOINDER OF OFFENSES. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.
>
> (b) JOINDER OF DEFENDANTS. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count."

Rule 24(c), Federal Rules of Criminal Procedure, provides in pertinent part:

> "(c) Alternate Jurors. * * * Alternate jurors in the order in which they are called shall replace jurors

who, prior to the time the jury retires to consider its verdict, become unable or disqualified to perform their duties. * * *."

Rule 27, Federal Rules of Criminal Procedure, provides:

"Rule 27. Proof of Official Record.

An official record or an entry therein or the lack of such a record or entry may be proved in the same manner as in civil actions."

Rule 43, Federal Rules of Criminal Procedure, provides in pertinent part:

"Rule 43. Presence of the Defendant.

The defendant shall be present at the arraignment, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by these rules."

Rule 44, Federal Rules of Civil Procedure, provides in pertinent part:

"Rule 44. Proof of Official Record.

(a) Authentication.

(1) *Domestic.* An official record kept within the United States * * * or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by his deputy, and accompanied by a certificate that such officer has the custody.

(b) Lack of Record. A written statement that after diligent search no record or entry of a specified tenor is found to exist in the records designated by the statement, authenticated as provided in subdivision (a) (1) of this rule * * * is admissible as evidence that the records contain no such record or entry."

STATEMENT

The indictment in 28 counts charged 27 substantive violations of the mail and wire fraud statutes, and a conspiracy to commit such substantive violations. Each count charged all petitioners. The trial judge acquitted all of the petitioners on five substantive counts, and two substantive counts were dismissed on the Government's motion. The jury found all the petitioners guilty on the conspiracy count, and certain of them guilty on various of the remaining substantive counts. The sentences imposed ranged from five years' imprisonment and a $10,000.00 fine for petitioner Hoffa to one hour in custody and a $5,000.00 fine for petitioner Weinblatt (D.A. 41-77, 25, 28, 31-32).[1]

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[1] "D.A." references are to the pages of the consolidated appendix for defendants as printed for the Court of Appeals in the original appeal, Nos. 14892-14898, inclusive.

"G.A." references are to the pages of the Government's additional appendix as printed in one volume for the Court of Appeals in the said original appeal.

"Tr." and "Ex." references are, respectively, to the typewritten transcript of the original trial proceedings and the exhibits received at the trial, all now on file with the Court.

"H.D.A." references are to the pages of the appendix for defendants-appellants filed in the Court of Appeals in the second appeal, No. 16634.

"H.Tr." and "H.Ex." references are, respectively, to the typewritten transcript of the "eavesdrop hearing" proceedings and the exhibits received at such hearing.

"Br. in Opp." references are to pages of the "Brief For The United States In Opposition" to petitioners' earlier petition for writ of certiorari, No. 1003, O.T., 1966.

"App." references are to the pages of the appendices printed at the conclusion of this Petition.

The Court of Appeals affirmed all convictions by a two-to-one vote, and denied rehearing *en banc* by a vote of seven-to-two.

Thereafter, defendants filed a petition for writ of certiorari. The Solicitor General responded and advised this Court that on December 2, 1963, some six months after the indictment in the case, a conversation between defendant Burris and one Benjamin Sigelbaum concerning the instant case was overheard by agents of the Federal Bureau of Investigation as a result of illegal electronic eavesdropping. This was the only disclosure of any illegally intercepted conversation.

Based upon the Government's confession, this Court granted the petition for writ of certiorari as to all defendants, vacated the judgment of the United States Court of Appeals for the Seventh Circuit, and remanded the case to the District Court for a hearing (hereinafter sometimes referred to as "the hearing") to determine whether the convictions were tainted by such eavesdropping.[2] This Court preserved to all affected parties the right to seek further appellate review. In view of the Government's confession, this Court did not reach "any of the contentions urged by petitioners in support of their petition for a writ of certiorari." *Hoffa, et al* v. *United States,* 387 U.S. 231 (1967).

After this Court's remand of the case to the District Court, the Government revealed for the first time, at that hearing, that it had in its possession *nine other* overhearings of some of the defendants. *Hoffa, et al.* v. *United*

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[2] Mr. Justice Black dissented from the vacation of the Court of Appeals' judgment and from the remand of the case to the District Court, but "would grant certiorari and set the case for argument". *Hoffa, et al.* v. *United States,* 387 U.S. 231, 234 (1967).

States, 273 F. Supp. 141, 143 (N.D. Ill. 1967). These previously undisclosed additional overhearings were submitted to and reviewed by the District Court *in camera.*

The District Court, after the hearing, found that the convictions were not tainted by the eavesdropping, reinstated the convictions, and imposed the same sentences previously imposed on the defendants. *United States* v. *Hoffa,* 273 F. Supp. 141 (N.D. Ill. 1967) (App. E, *infra,* p. 90).

During the oral argument of the appeal taken from the District Court's decision on that hearing, the attorney who represented the Government disclosed for the first time in any court proceeding that eavesdropping of certain defense attorneys had occurred. The attorney handed to the Clerk of the Court of Appeals a sealed folder which contained the FBI logs of the conversations. A panel of the Seventh Circuit examined *in camera* the contents of the sealed folder (App. F. *infra,* pp. 98, 117). A motion of defense counsel to examine the admitted overhearings of lawyers was denied.

The Court of Appeals affirmed all convictions by a two-to one vote, and denied a petition for rehearing.

For the convenience of the Court, we present as Part I of this Statement, the facts relating to issues arising from the Government's unlawful eavesdropping and the hearing on remand, and as Part II, the facts relating to issues which arose during trial.

I.

GOVERNMENT'S ADMITTED ILLEGAL OVERHEARINGS AND PETITIONERS' RIGHTS AFFECTED THEREBY.

A. The Object of The Alleged Conspiracy.

The indictment alleged that defendants banded together to obtain, by means of false and fraudulent representations, 21 specified loans totaling $20,000,000.00 from the Central States, Southeast and Southwest Areas Pension Fund (hereinafter referred to as "the Fund") for 14 separate businesses.[3] It was further charged that some defendants demanded and were paid by the said businesses, fees and other benefits totaling $1,000,000.00 for obtaining these loans. Finally, the indictment charged a two-fold object of the conspiracy and scheme: (1) to obtain $100,000.00 of such fees and benefits for the purpose of relieving the distress of Sun Valley, Inc., a real estate development company in which defendant Hoffa was claimed to have an interest,[4] and (2) to divert, for purposes other than those

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[3] The Fund is administered jointly by eight employers and eight union trustees. (Ex. 1, Article II, Sec. 2; D.A. 1959, 555). Each trustee has one vote only, and no one trustee has any authority over any other. (Ex. 1, D.A. 874, 1964).

The Fund regularly invests a part of its $300,000,000.00 assets in loans to real estate ventures such as those involved in this case. (D.A. 818-822, 868-873, 1795, 1967-1971).

[4] Both the majority and dissenting opinions of the Court of Appeals stated that the common object or design of the claimed scheme and conspiracy was to obtain money for the purpose of relieving the financial distress of Sun Valley for Hoffa's benefit. *United States* v. *Hoffa, et al.*, 7 Cir., 367 F. 2d 698. This Court's *per curiam* opinion states that the "prime objective" was the financial rehabilitation of Sun Valley, Inc. *Hoffa, et al.* v. *United States*, 387 U.S. 231; App. D, *infra*, p. 74.

represented to the trustees the entire $1,000,000.00 in fees and benefits for the personal use of all of the defendants (D.A. 41-77).

The indictment generally alleged that the defendants Dranow, Burris, Kovens and Weinblatt cooperated in seeking out loan applicants and assisting them in preparing materially false applications to the Fund. Strate and Hyman were alleged to have been among those who submitted such applications. Defendant Hoffa was alleged to have used his position as a trustee of the Fund to further misrepresent the facts and thereby influence approval of the loans.

Defendants Dranow and Burris, together with Benjamin Sigelbaum and others not claimed to be conspirators, took steps to reorganize and refinance Sun Valley (D.A. 1403, 1405, 1407, 1554-55). Burris and Sigelbaum were both key figures in said reorganization. Burris initiated and furthered the project of reorganizing Sun Valley, Inc. by raising necessary capital to pay off its creditors, get it out of bankruptcy and acquire its ownership. Sigelbaum contributed substantial capital to the project, and induced others to do the same, thus arranging for a total of more than half of the required capital. Sigelbaum was not a witness at the trial.

B. Government's Confession In This Court.

In response to defendants' petition for a writ of certiorari to review the judgment of the Seventh Circuit, the Government advised this Court that pursuant to its policy announced in the Government's Supplemental Memorandum in *Schipani* v. *United States*, 385 U.S. 372, the Government "conducted a review to determine whether electronic eavesdropping or wiretapping affected the convictions of any of the petitioners". The Government asserted:

> "We have found nothing in that review warranting notification to this Court or any further proceedings

in this regard with respect to petitioners Hoffa, Dranow, Strate, Weinblatt, Kovens and Hyman." (Br. in Opp. 64)

With respect to defendant Burris, however, the Government advised for the first time that the FBI had secretly installed and maintained a microphone in the Miami office of Benjamin Sigelbaum for the two and one-half year period from January, 1963 until July, 1965 (Br. in Opp. 64), and that on December 2, 1963, six months after indictments in this case, overheard and recorded a conversation between Sigelbaum and defendant Burris.[5]

The Government advised this Court that defendant Burris "apparently" visited Sigelbaum's office on that one occasion during the period of the unlawful surveillance, that defendant Burris engaged in such overheard conversation, and that the only participants in the conversation were Burris and Sigelbaum. The Government also stated that "a verbatim transcript of that conversation appears in the FBI logs" (Br. in Opp. 64), but did not furnish such transcript to this Court. Rather, it merely presented a one paragraph resumé of the said conversations.

The Government admitted to this Court that the contents of that eavesdropped conversation had been summarized in a report which was sent to some of the *Government attorneys* who prosecuted the case,[6] but claimed that

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[5] The Government failed to disclose that during pre-trial proceedings before the original trial, defense counsel requested the Court to order the Government to produce any recordings of "bugged" conversations relating to this case, even if the Government claimed the "bugging" was legal. The Government remained silent at that time. (H.D.A. 490-492).

[6] The hearing below disclosed that two separate FBI "summary reports" of the conversation had been prepared. Both summaries were sent to the FBI Washington headquarters and Chicago Field Office and one such summary was received by many Government trial counsel (H.D.A. 1052-54, 1033, 1059).

"any information contained therein that was remotely relevant to the facts of the case was already known to them from other sources" (Br. in Opp. 65).[7] Such report was not furnished to this Court. The Government also represented that "the conversation was never used as the basis for any investigative lead by the government attorneys, the Federal Bureau of Investigation or any other government agency" (Br. in Opp. 65), and that the eavesdropped conversation "related to a minute, peripheral aspect of the many transactions underlying the charges. . . . ." (Br. in Opp. 66).

The Government did not advise this Court that the foregoing "summary report" was prepared by a major Government trial witness, FBI Agent John C. Connors, who had prior to the indictment been assigned to the investigation of defendants Hyman, Kovens, and Hoffa and anyone else in connection with Pension Fund Loans (H.D.A. 1024-25, 1094.)

Furthermore, while the government represented to this Court that a potential defense witness was discussed, it vouched "[t]he possible witness mentioned in the conversation never testified, and the government does not, to this day, know who he is or his relation to any of the parties or transactions involved in this case." (Br. in Opp. 65-66). The hearing disclosed, however, that the Government had interviewed that person a year before the trial and obtained an affidavit from him (H.D.A. 224-226, 1332-1334).

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[7] The hearing disclosed that at least six documents were not in the prosecutors' possession until shortly before trial (H.D.A. 103-4, 1108, 1240). Of the six, the district court specifically relied on three to support his conclusion that the Government did have prior knowledge of the contents of the eavesdropped conversation (H.D.A. 167-8).

C. This Court's Order.

Although the Government urged that any inquiry into such unlawful eavesdropping activity be confined to the conviction of defendant Burris, this Court held that all defendants were entitled to such a hearing. 387 U.S. 231.

This Court noted the Government's representation and based on such representation remanded the case to the District Court for a hearing, findings and conclusion "on the nature and relevance to these convictions of the recorded conversation, and of *any other conversation that may be shown to have been overheard through similar eavesdropping*" (emphasis added; 387 U.S. 231, 233).

Accordingly, this Court granted the writ of certiorari as to all defendants, vacated the judgment of the Court of Appeals, and remanded the case to the District Court for further proceedings, directing the District Court to confine the evidence presented *by both sides* "to that which is material to the questions of the content of this and *any other electronically eavesdropped conversations,* and of the *relevance* of any such conversations to petitioners' subsequent convictions". 387 U.S. 231, 233-34 (emphasis added).

D. Government Log Of The Eavesdropped Conversation And "Summary Reports" Of Said Log.

On the remand of the case, the Government, for the first time, filed with the District Court and furnished defendants the log of the overheard Sigelbaum-Burris conversation.

Agent Connors testified that the eavesdropping log was routed to him about December 2, 1963 by "somebody"[8]

[8] The defense unsuccessfully attempted to determine the reasons why the log was routed to Connors, but were prevented from doing so by the trial court (H.D.A. 1023-1026).

in a supervisory capacity in the FBI Miami office (H.D.A. 1023, 1047), that he knew the conversation between Burris and Ben Sigelbaum had been monitored by microphone surveillance (H.D.A. 1027), and that he had identified Burris as being one of the participants in the conversation[9] (H.D.A. 1046, 1048). Connors knew at the time he received the log that Burris was under indictment (H.D.A. 1076). On January 11, 1964, Connors prepared a "summary report" of the eavesdropped conversation. It was furnished defendants for the first time at the hearing (H.D.A. 33, 233-252).

During the years 1962, 1963, and up to January 13, 1964 (H.D.A. 1004), agent Connors was assigned to Miami, Florida to investigate defendant Hyman and his Key West properties, petitioner Kovens' activities in connection with the Pension Fund (H.D.A. 1024-25, 1094), and Hoffa in connection with the Key West loans and other Pension Fund loans (H.D.A. 598). Connors was also instrumental in preparing the Government's evidence concerning all of the financial transactions involved in this case (H. Def. Ex. 7; H.D.A. 221-224), but had nothing to do with any separate investigation of Benjamin Sigelbaum (H.D.A. 1099). Connors ultimately became one of the Government's principal witnesses at the trial of this case (H.D.A. 585-598; D.A. 1681-1732, 1737-1742).

A routing slip or transmittal sheet was attached to the "summary report" and disclosed that the Director of the FBI sent the report to the Assistant Attorney General, Criminal Division, Herbert Miller, and to the attention of Walter J. Sheridan, who worked for Attorney General Robert Kennedy as a special investigator on matters in-

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[9] FBI Agent Doerner testified that his supervisor, Mr. Swinney, routed the log to Connors (H.D.A. 1269).

volving petitioner Hoffa (H.D.A. 1273-1277). Miller testified that he thought that the summary probably went to Sheridan's office because most investigative reports concerning Hoffa usually went there (H.D.A. 1276-1277). A secretary in Sheridan's office wrote "Poretz, Smith, etc." on the transmittal sheet (H.D.A. 127). Poretz was the Government attorney then in charge of the trial, and Smith was his co-counsel.

Poretz routed the summary by writing on the transmittal sheet the names of Government attorneys who assisted him: Ryan, Canavan, and McTiernan. Messrs. Ryan, Canavan, and McTiernan initialed the report after it came to their attention (H.D.A. 126-127, 1114).[10]

The notations made by Government prosecutors upon the January 11, 1964 summary of the overheard conversation are of such magnitude to a meaningful determination of the ultimate issues, that we reproduce the same hereinbelow for the Court's observation.

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[10] William Ryan, the only Government trial counsel who testified at the hearing, said that he recognized his initials on the summary report and that he probably saw it shortly after January 11, 1964 (H.D.A. 1114), approximately three months before the commencement of the trial.

UNITED STATES DEPARTMENT OF JUSTICE

FEDERAL BUREAU OF INVESTIGATION

In Reply, Please Refer to File No.

Miami, Florida
January 11, 1964

RECEIVED
JAN 14 1964

RE: JAMES RIDDLE HOFFA; ET AL;
TEAMSTERS UNION PENSION FUND LOANS,
CHICAGO, ILLINOIS

The following information has been obtained by the Miami Office of the FBI from a source of information whose identity is confidential and who is not available for recontact or for testimony.

The source advised that S. George Burris and Ben Sigelbaum of Miami recently negotiated regarding the possible sale of Burris' interest in Sun Valley to Sigelbaum. Sigelbaum insists that he had a prior claim against Burris' interest, and he had not pressed it before because Ben Dranow was getting in trouble and everybody wanted to get Dranow and Hoffa straightened out. Burris' contention, according to the source, is that he put up the money for a 10 per cent interest by borrowing $57,000 from Kipnis and that later he repaid Kipnis from a fee Kipnis paid him. He contended that he was supposed to get another $90,000.

Irving B. Kipnis

Sigelbaum also contended, according to the source, that one Barney and a Yiddy, or Uddy, also had a claim against Burris' interest in Sun Valley but Burris' contention is that their claim is against Dranow's interest.

Sigelbaum promised Burris, according to the source, that he would work out a deal with him and that he did not think there was enough money in the world to compensate him for what he had gone through. Sigelbaum's feeling, the source indicated, is that everybody went into Sun Valley to

X 1 cop

PLAINTIFF EX. 2-3 id RJC

make money, and he put money in to bail out Ben and Sun Valley, and they sit back and know nothing except that they made a profit. Both Sigelbaum and Burris agreed that the important thing is that they are walking the streets, according to the source.

The source advised that Burris feels that in the pending Hoffa trial in Chicago, the government will throw in everything and hope that the jury will feel that where there is smoke there must be fire.

Sigelbaum's feeling about the Chicago trial was that the conspiracy had to be proven and commented that a lot of people had been subpoenaed.

According to Burris, the source advised, if the witnesses tell the truth, they would have to say there was no conspiracy, that no one was ever promised anything, that everyone had to go before a fund where there were disinterested people, and that the properties were all properly appraised with extra collateral required in many cases.

Sigelbaum stated, the source advised, that one Bill Manhaight, an attorney, who is building a hotel in Atlantic City, would be a good witness for the defense and indicated that Manhaight would say he had met Burris in connection with a loan, that he had a difficult time getting a loan, and had to put up additional collateral.

Such testimony would help defendants

Sigelbaum also stated, according to the source, that every big criminal lawyer in Chicago wanted to get into the case.

Burris felt, according to the source, that in the Key West case, Sam Ryzen used the money a little differently

when he first obtained it and then ultimately put it into the property.

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In the foregoing report, Agent Connors summarizing and analyzing the log of the eavesdropped conversation, reported among other things that:

(1) Burris and Sigelbaum recently negotiated the possible sale to Sigelbaum of Burris' interest in Sun Valley and Sigelbaum said the reason he had not pressed his claim against Burris was that Dranow was getting in trouble and everyone wanted to see Dranow and Hoffa straightened out.

(2) Burris stated that he had borrowed $57,000.00 from Kipnis which Burris used for his 10% interest in Sun Valley, and that he had repaid the $57,000 from a fee Kipnis paid him. Burris also contended that he was supposed to get another $90,000.00. [*In the margin of the report dealing with this discussion, Charles Smith, one of the chief trial counsel for the Government, penciled the name of "Irving B. Kipnis", a Government witness* (H.D.A. 126-127)].

(3) Burris said that if the witnesses told the truth, they would say that (a) there was no conspiracy; (b) no one was promised anything; (c) the loans had to be approved before a disinterested board; and (d) the properties were all properly appraised with extra collateral required in many cases. [*The thoughts and statements of Burris were bracketed in pencil by an "unknown person".*][11]

(4) Sigelbaum stated that Bill Manheight, an attorney who was building a hotel in Atlantic City, would be a good defense witness and indicated that Manheight would say he met Burris in connection with a loan, that he had a difficult time getting a loan and had to put up additional

[11] The defense requested that the Government identify the person who bracketed Burris' statements, but the Government replied that it did not know the person's identity.

collateral. [*In the margin at this portion of the report, Abraham Poretz, the original chief trial counsel for the Government, wrote: "Such testimony would not be admissible."* (H.D.A. 126-127)].

(5) Burris said that in the Key West case, defendant Sam Hyman used the money a little differently when he first obtained it and then ultimately put it into the property. [*In the margin at this portion of the report, Poretz wrote: "Does this check out?"* (H.D.A. 126-127)].

In addition to the foregoing report, Connors had on December 26, 1963 prepared an earlier report of the eavesdropped conversation. This report was sent by him to FBI headquarters in Washington, D.C. and to the Chicago Field Office of the FBI. Connors said that the January 11, 1964 report was simply a re-submission of the December 26, 1963 report after administrative corrections, including the omission of direct quotations (H.D.A. 1058). The dissenting opinion in the Court of Appeals found that the January, 1964 report was "written in an attempt to camouflage the fact that the information in the report was obtained from a 'bugged' conversation." (App. F, *infra*, p. 106).

E. The Advantage Derived By The Government As A Result Of The Unlawful Eavesdropping.

During the course of the hearing, the Government introduced numerous exhibits (H. Gov. Exs. 4-27) for the purpose of showing that the Government's evidence presented at trial was not tainted by the illegal eavesdropping. At the close of the eavesdrop hearing, the Government contended that the "*prosecutors*" had knowledge of a "*majority*" of the Government's exhibits prior to the date of the eavesdropping and had knowledge of all of the exhibits prior to trial (H.D.A. 1240).

The District Court held that (1) the Government obtained no new information from the eavesdropping; (2) none of the overhearings had any relevance to the convictions of the defendants; and (3) "the convictions of none of the defendants were tainted by *the use of evidence improperly obtained.*" (Emphasis added; App. E, *infra* pp. 89-90)[12] The Court did not make the specific findings of whether investigative leads or "follow-ups" resulted from the eavesdropping.

At the trial, in support of the Government's allegations that loan proceeds were spent for a different purpose than that represented to the Fund, Connors testified about his preparation of summary charts showing the receipts and disbursements of Key West Foundation Company from November, 1959 to December 31, 1960 (H.D.A. 585-598). The defense vigorously opposed Connors' testimony and the introduction into evidence of his charts on the ground that he had not considered any expenditures made after December 31, 1960 when, in fact, Key West had expended large amounts of money for building improvements in early 1961 (D.A. 1774-1783). Initially, Connors testified that his charts were intended to reflect "what was truly spent for building improvement" (H.D.A. 587). Later, however, he admitted that some expenditures for fixed assets of Key West were not included in his charts and that they reflected only what the books of Key West showed with regard to building improvements (H.D.A. 588). The defense unsuccessfully moved at trial to strike Connors' testimony (H.D.A. 586), pointing out that sizable

[12] Although the Court's findings are ambiguous, it seems that the Court acknowledged the "use" of the log and summary by the Goovernment attorneys, but because one or several Government employees (including the IRS) possessed prior "independent source information", the "use" did not taint the convictions.

expenditures were made by Key West during early 1961 and at other times which were not shown on Connors' charts (H.D.A. 586-598; D.A. 1681-1732, 1737-1742).

Connors said, at trial, that the Government attorneys requested him two weeks before trial to end his summaries with December 31, 1960, even though he had previously prepared worksheets covering the subsequent periods (H. D.A. 597, 1019). These prior worksheets were destroyed by Connors after his consultations with Government counsel and after Government counsel saw the worksheets (H. D.A. 594, 1017, 1019).

Indeed, it was learned for the first time at the eavesdrop hearing that on October 8, 1963 Connors had prepared a report relating to his discussions with Government counsel Poretz and Ryan during the week of September 30, 1963 (H.D.A. 221-224). Among other things, that report stated that the accounting summaries to be prepared for the trial should *include* the receipts and disbursements of Pension Fund borrowers "during the period covered by investigation" (H.D.A. 221). *The report specifically stated that the period covered by the chart with regard to the Key West Project was to terminate April 30, 1961* (H.D.A. 222). At the time of Connors' changes to his accounting documents both he and the trial prosecutors were aware of the proposed defense disclosed by the overheard conversations.

Two of the judges of the Court of Appeals sustained the District Court's finding that the convictions were not tainted by the illegal evidence. In support thereof they asserted that the indictment was returned six months before the overhearing and spelled "out in detail the roles played by each of the defendants", mentioned all of the proven loan transactions, and therefore such particularity could not "have been obtained from a cryptic half hour

conversation which occurred six months after the indictment had been returned." (App. F., *infra,* pp. 96-97). The dissent stated that the knowledge gained by the overheard conversation as to the intended defense to the Government's charges was used by Agent Connors, pursuant to the directions of the Government prosecutors, to tailor his accounting summary and his testimony in order to destroy the defense. (App. F, *infra,* p. 112). The majority opinion did not consider whether the Government had "tailored" its proof to destroy the defense.

F. Government's Unilateral Decision To Conceal "Jenck's Statements" From Trial Court And Defense.

During the trial, there was an understanding approved by the Court that "3500 material" would be furnished defense counsel the evening before a witness' testimony without the necessity of renewing a request therefor (H.D.A. 533-534).

In addition, defense counsel specifically asked Connors at trial if he had rendered "any report concerning your work?" (H.D.A. 594). Connors answered that he had not rendered any reports or FBI Form 302 reports (H.D.A. 594). Defense counsel then asked: "Not one in this whole period of time?", but the Government's objection was sustained (H.D.A. 594). The next day, defense counsel again asked Connors: "Who have you told about your investigation—about the results of your investigation?" The Court sustained the Government's objection, stating, "You went all over that yesterday looking for 3500 statements." (H.D.A. 598).

Despite the Government's initial denial that Agent Connors had prepared any reports, it was disclosed at the eavesdrop hearing that he had in fact prepared three reports in 1963 and 1964. Two of the reports were the sum-

maries, dated December 26, 1963 and January 11, 1964, of the electronically overheard Burris-Sigelbaum conversation. In the third report, written on October 8, 1963, Agent Connors set forth the type of accounting summaries he was to prepare for use at the trial. This report was produced by the Government at the hearing in response to a demand for the production of "3500 statements" (H.D.A. 1057).

The majority of the Court of Appeals held that the aforesaid memoranda failed to meet the statutory requirements of 18 U.S.C. §3500. With respect to the summaries of the Burris-Sigelbaum conversation, the majority stated that these summaries did not relate to Connors' accounting testimony and, therefore, had no impeachment value to the defendants. (App. F, *infra,* p. 99). The dissent concluded that the refusal by the Government to admit that Agent Connors had prepared any reports, was a unilateral usurpation of the District Court's function to determine whether the documents came within the purview of Section 3500. The dissent further stated that the three reports were "relevant and material to the defense", commenting that Agent Connors "lied on the witness stand" in denying at the trial that he had made any reports during his investigation (App. F, *infra,* pp. 115-116).

G. The Denial To The Defense of Additional Admitted Eavesdrops On Defendants' Conversations.

In its response to defendants' earlier petition for certiorari, the Government mentioned only the December 2, 1963 overheard Burris-Sigelbaum conversation, and represented to this Court that its review of its files reflected nothing which warranted notification to this Court with respect to any of the remaining defendants. No reference or representation whatever was then made as to any other eavesdropped conversation of any of the defendants. At

the eavesdrop hearing, the Government did, for the first time, admit that there were indeed nine other overhearings of "some of the defendants". These additional overhearings were submitted to the Court for an *in camera* inspection on the Government's representation that they were irrelevant to the convictions. (H.D.A. 849). The defendants' request to examine the contents of the exhibit was denied (H.D.A. 855-64, 865); and the Court found, based thereon, that these additional overhearings contained "no information either remotely or peripherally relevant to the transactions and evidence on which these defendants were indicted and convicted." 273 F. Supp. 141, 143. The majority of the Court of Appeals agreed with that conclusion. (App. F, *infra, p.* 94).

H. The Denial To The Defense Of Admitted Eavesdropped Conversations Of Defense Counsel And Investigators.

Before and during the eavesdrop hearing, the defense sought to obtain from the Government all logs, records, reports or other information relating to any electronic eavesdropping or electronic surveillance by the Government on counsel for the defendants (H.D.A. 39, 79). Although the Government represented to the District Court that it had in its possession no records of overheard conversations of the defendants other than those already disclosed, it pointedly made no representation as to whether it did or did not have records of conversations of defense counsel (H.D.A. 619, 623). The defense made numerous renewals of its request for the production of such records, but such requests were repeatedly denied by the District Court (H.D.A. 635, 642-643, 857-858, 838-843, 866, 1437, 1513). The Government took the position with regard to these requests that it was required to disclose to the Court only those eavesdropped conversations in which a defendant participated.

The Government's position was reiterated in its brief filed in the Court of Appeals. However, in response to a question from the Court during the oral argument on appeal, Government counsel revealed that the Government possessed logs of eavesdropped conversations of certain defense attorneys. At the conclusion of the oral argument, Government counsel left with the Clerk of that Court an envelope containing those logs, with instructions that the contents be made available only for the use of the Court. A defense request to examine the contents of the envelope was denied.

The majority opinion in the Court of Appeals indicated that it had examined *in camera* the contents of the sealed folder containing the eavesdropping of defense counsel and concluded that "the information is completely irrelevant to the Hoffa case before this Court" (App. F, *infra*, p. 98). In regard to the Government's conduct, the dissent stated:

> ". . . The Government's narrow and cavalier response to the Supreme Court's broad direction ought not to be condoned." (App. F, *infra*, p. 117),

and that it was improper for the Court of Appeals to initially examine the logs, whether *in camera* or not, to determine their relevancy to the issues and the case.

At the time of the indictment and trial below and for some long prior period, Charles O'Brien was employed as an investigator to assist the defense attorneys concerning the pending indictments against Hoffa, including the indictments involving Sun Valley transactions (H.D.A. 120, 1461). During the month of January, 1964 and for months prior thereto, he had frequent telephone conversations with defense attorneys regarding investigatorial assignments relating to the Sun Valley matters (H.D.A.

1461-1462). In 1967, a conviction of O'Brien in the Federal District Court, Eastern District of Michigan, was reversed by this Court because of the admitted eavesdropping by the Government on a telephone conversation between O'Brien and his counsel in January, 1964 (386 U.S. 345). Said counsel was also then counsel for petitioner Hoffa in the instant proceedings (H.D.A. 120, 1461).

At the hearing, the Government adamantly refused to produce the logs and other memoranda relating to the admitted electronic surveillance of O'Brien for defendants' inspection, and the Court denied defendants' requests and subpoenae for such documents (H.D.A. 630-639, 961-964, 1290, 1368, 1447-1448). The Court at one point (H.D.A. 964) indicated that the O'Brien log would not be ordered produced in the absence of an affidavit that O'Brien discussed Sun Valley matters with defense counsel. When just such an affidavit was filed by O'Brien (H.D.A. 128, 1290-1), the Court nevertheless denied the defense requests for such logs (H.D.A. 1368). The request was again made and denied (H.D.A. 1465), after O'Brien *testified* with regard to his employment by the defense and his frequent use of the telephone in discussing his work on the case with defense counsel during January, 1964 and prior thereto (H.D.A. 1460-1465).

Though this issue was raised in the Court of Appeals, it did not consider whether the defendants were entitled to examine such logs.

I. The Admission Of Evidence By Affidavits.

The District Court ruled that the Government was required to prove at the hearing not only that the December 2, 1963 overheard conversation did not taint the convictions of the defendants, but also that the Government had not eavesdropped upon any other conversations of the

defendants concerning the instant case (H.D.A. 848). Thereupon, the Government attempted to prove that it did not possess such other conversations by introducing into evidence the affidavits of Charles Bolz (H.D.A. 118) and Leon Green (H.D.A. 119).

The Bolz affidavit asserted that he was the Section Chief of the Accounting and Fraud Section of the Federal Bureau of Investigation, that the FBI had caused a diligent search to be made of its records to determine the existence of the overhearing of any conversation participated in by any of the defendants, and that said search resulted in the discovery of only the December 2, 1963 Burris-Sigelbaum conversation and other recorded conversations of defendants which had been turned over to the Court *in camera* as Plaintiff's Exhibit 1-A.

The Green affidavit stated that he was Deputy Assistant Commissioner of the Internal Revenue Service, that the IRS had caused a diligent search to be made of its records to determine the existence of such overheard conversations, and that such search had revealed no such overhearing of the conversations of any of these defendants.

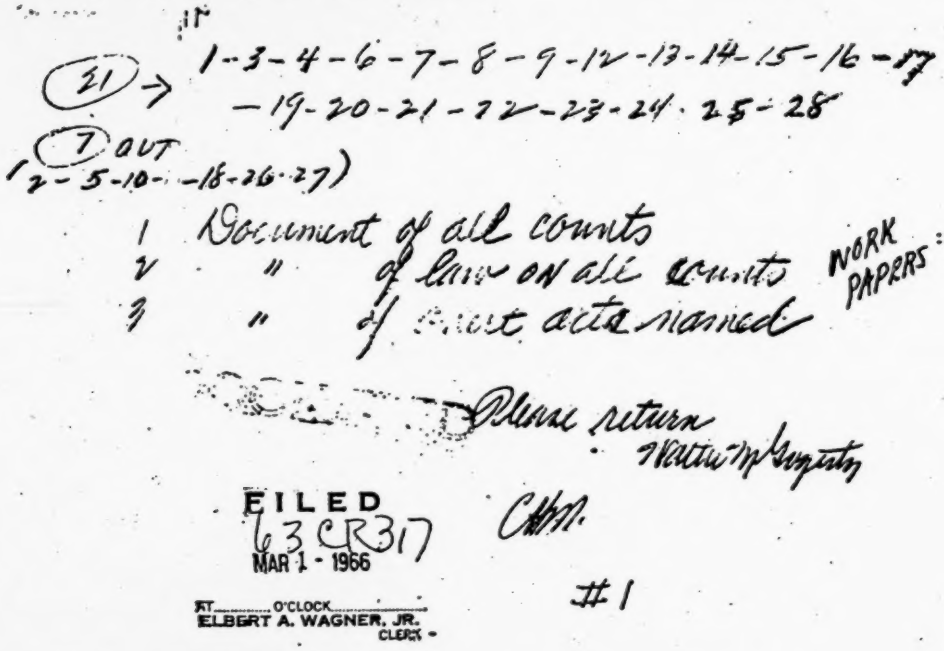
The defense urged that such affidavits constituted hearsay and related to a search not conducted by said affiants; that they were not in charge of the records allegedly searched; that said affiants were not produced in Court for confrontation and cross-examination; and, that the admission of such affidavits constituted a deprivation of defendants' rights to due process of law (H.D.A. 848-849, 853, 858-864). Nevertheless, the Court received such affidavits in evidence (H.D.A. 864). The Court of Appeals, relying on Rule 27, F.R.Cr.P., held that the admission of such evidence was not prejudicial error (App. F, *infra*, p. 96).

II.

VIOLATIONS OF SUBSTANTIAL RIGHTS OF PETITIONERS DURING TRIAL.

A. Communications From Trial Judge To Deliberating Jury In Absence Of Defendants And Their Counsel.

On the evening of the first day of the jury's deliberations, the trial judge, while in chambers, received a written communication from the jury delivered by the Marshal in charge of the jury (D.A. 2178). The communication was in two pages, the second of which merely listed the names of the jurors. The first page, signed by Foreman Gogerty, is reproduced in full.



(D.A. 2179-2180).

In response to this communication, the trial judge, via the Marshal, sent a copy of the indictment to the jury with the oral instruction to them: "This is all that they are going to get" (D.A. 2180). This action was taken without notice to the defendants or their counsel (D.A.

2229), although the Court had promised to notify counsel in the event of any inquiry from the jury. (Tr. 16521-22).

The copy of the indictment was unexpurgated. It contained the seven counts not submitted to the jury. It further contained allegations, incorporated by reference in all counts, of a breach of trust by petitioner Hoffa on which there was no Government proof.[13] (Doc. Ex. 6 of August 17, 1964; Tr. 15294). Those allegations referred to a separate and independent "judicial proceeding" in which petitioner Hoffa was "being questioned . . . [about] a breach of his fiduciary duties" in the handling of his union's funds.[14] (Count I, par. 4(c); D.A. 44). The Court had excluded proferred evidence to this effect and had previously ordered that this part of the indictment not be read to the jury (Tr. 15293-94).

The jury, which had retired on July 24, the day they received the unexpurgated indictment and the instruction that they would get no more, continued their deliberations until July 26 when the verdicts of guilty were returned. After the jury verdicts, petitioners first learned of the trial judge's *ex parte* communication to the jury. A motion for new trial on the ground of the communication was denied (D.A. 2171-2173, 2178-2180, 2239-2243).

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[13] The copy of the indictment also had ambiguous markings on it, including arrows drawn to the name of petitioner Hoffa (D.A. 2173-2175, 2231). Neither the trial judge nor the Marshal made the markings; but, whether they were on the copy of the indictment as received by the jury remains uncertain. Neither the trial judge nor the Marshal examined the copy before its delivery to the jury (D.A. 2174, 2175, 2230).

[14] Over petitioners' objection (D.A. 2153), the Court instructed the jury:

> "One using a fiduciary position, a position of trust, to obtain benefits is not only performing a breach of trust but is performing an active fraud." (D.A. 2141; Tr. 15281, 15368; G.A. 226-227).

The majority of the Court of Appeals held that the trial judge's communication to the jury in the absence of petitioners and their counsel, although "not good practice", was "not prejudicial" (App. A, *infra,* p. 28). The dissenting judge: (1) saw "plain error" in the trial judge's action; (2) doubted the need of petitioners to show prejudice for reversal, "since the error committed was of constitutional proportions"; and (3) in any event found that the record does not negative but affirmatively shows a reasonable possibility of prejudice to petitioners necessitating reversal (App. A, *infra,* pp. 45-46).

B. The Jury Instruction That One Using A Position Of Trust To Obtain Benefits Is Performing An Active Fraud.

In this mail fraud case, the trial court, over the objection of petitioners (D.A. 2153), instructed the jury as follows:

> "One using a fiduciary position, a position of trust, to obtain benefits is not only performing a breach of trust but is performing an active fraud." (D.A. 2141; Tr. 16505).

The evidence in this case showed the various petitioners had economic relations with each other or with others. The jury could have understood any of these relations to be fiduciary relations.

Further, the Court's sending of the indictment to the jury (see *supra,* pp. 30-32) informed the jury that petitioner Hoffa's actions as an officer of his union were being elsewhere questioned in a federal judicial proceeding "as a breach of his fiduciary duties." (Indictment, Count One, par. 4(c); D.A. 44).

The Court of Appeals found no error in the foregoing instruction. (App. A, *infra*, p. 33). However, the majority opinion stated that the jury could have regarded petitioner Hoffa's "connnection with Sun Valley * * * as a violation of his fiduciary duties to the beneficiaries of the Teamster Pension Fund." (App. A, *infra*, p. 15).

C. Failure Of Cautionary Instructions To Remove Prejudice Ensuing From Incriminatory Admissions Of Co-Defendants.

Co-defendant Dranow testified in his own behalf at trial. During his cross-examination, the prosecutor asked:

> "* * * Did you ever write a letter to S. George Burris in which you told him, 'Everything can be blamed on me, and everything that could be put onto me to protect others should be blamed on me. But don't let that affect your feelings toward me in any way whatsoever'." (D.A. 1910).

The Court overruled objections and motions for a mistrial by other petitioners. The judge instructed the jury to consider the matter only as to Dranow (D.A. 1911). A request for a hearing outside the presence of the jury as to the materiality of the matters contained in the letter was denied, and a motion for a mistrial was denied. The jury was again instructed that the matter was to be considered by them only for the purpose of impeachment of Dranow's testimony and to affect his credibility (D.A. 1912-14).

Petitioners Dranow then testified that although the letter was in his handwriting, he did not recall writing or sending it, or to whom it was written[15] (D.A. 1914-15).

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[15] The letter, Gov. Ex. 1001, was addressed to "George".

Over further objections of defense counsel (Tr. 14397-14401), Dranow was asked if he wrote a second letter, saying:

> "I want the following amounts put away for me from each of the following persons each day. I want all this money put in one spot where it will be picked up four or five times a year, and enable me to pay for the new place and business:
>
> a. The California buildings, $10.00 per day;
>
> b. George Burris, Irving ask George, $10.00 per day;
>
> c. Sam Hyman, George ask Sam, $10.00 per day;
>
> d. Cal Kovens, George ask Cal, $10.00 per day;
>
> e. Glen Hillborn, Fashion Mart Building, George ask Glenn, $5.00 per day;
>
> f. Lou Gladstone, Milton talk to Lou, $15.00 per day." (Tr. 14399).

Objections to this question and motions for severance were again overruled, and the judge again limited the evidence to Dranow. Dranow replied that the letter was in his handwriting, but that he didn't recall the details of when he had written it or whether it had been delivered to Irving Link (D.A. 1915).

Irving Link, who had testified during the Government's case in chief, was later recalled as a rebuttal witness. Link testified that Dranow told him in September, 1962 that there would be mail addressed to a friend of Dranow's, Buck Traub, which was meant for Link. Link said that he picked up a letter thus addressed, which later proved to contain the two letters about which Dranow was questioned (D.A. 2020).

Subsequently, the Court refused to admit the letters into evidence. The Court referred to the prejudicial nature of the letters, noted that an "inference" could be drawn that they referred to Dranow's other prosecutions, and also commented that "weighing the dangers against the benefits, I'm going to protect this record." Later the judge instructed the jury to disregard the testimony of both Dranow and Link in regard to the letters (D.A. 2059, 2061-66). Motions for mistrial and for severance were again denied (D.A. 2062).

During the trial, the Government, over strenuous objection by the defense, was permitted to introduce into evidence certain extrajudicial admissions of the defendant Burris made by him during a congressional inquiry prior to indictment (G.A. 74-82, 92-103). These admissions were highly relevant to the issues before the Court and jury, and were incriminatory to Burris and other defendants. They related to the stock ownership of Sun Valley, and the interests therein of defendants Hoffa, Dranow and Burris and constituted an admission that Burris was in fact a "front" for Dranow in the ownership of such stock (G.A. 74-82). When these admissions were offered, defense counsel objected thereto on the specific ground that the co-defendants would be thereby denied the opportunity to cross-examine Burris with regard to his earlier admissions D.A. 1436-37, 1440, 1458). Yet, the Court overruled such objection and permitted the reading of the admissions to the jury (D.A. 1458; G.A. 74).

The Court of Appeals on the original appeal held that it was proper to try the defendants together inasmuch as they were all part of one conspiracy. Further, that the joint trial with Dranow was not error inasmuch as there was an "extremely close association of Hoffa and Kovens with Dranow in various loan transactions" (App. A, *infra*, p. 18).

The dissent stated that the letters sought to impeach Dranow's testimony were "inherently prejudicial to all defendants" and "conveyed a strong inference of guilt of all". In addition, the dissenting judge stated "as to those named in the second letter, the inference was inescapable that they were guilty of some misconduct for which they could be blackmailed for an indefinite period of time. Asking a jury to compartmentalize or disregard such evidence was an impossible task." The dissent found that the defendants' motion for severance from Dranow should have been granted (App. A, *infra,* p. 41).

Thereafter, on appeal from the eavesdropping hearing, the majority concluded that this Court's decision in *Bruton* v. *United States,* 391 U.S. 123, was inapplicable, since the letters used to impeach Dranow were excluded as to all defendants and an appropriate instruction was given. Therefore, they concluded, nothing in *Bruton* affected the validity of their decision with regard to the said letters. Furthermore, the majority held that the admissions made by petitioner Burris were not incriminating as to any co-defendant. (App. F, *infra,* pp. 102-3)

D. Prejudicial Newspaper Articles Imparted To Sequestered Jury By Its Foreman And Prejudicial Statements By Some Jurors.

After jury verdict, but before sentencing, the defense moved for a new trial or inquiry of the jurors on the basis of the testimony of an alternate juror named Pare' (D.A. 2181, 2212, 2213-5). The events testified to by Pare' first came to the attention of the defense when Pare', on his own initiative, sought out defense counsel after the jury's verdict (D.A. 2187). Pare' had been excused as an alternate juror when the jury retired for its deliberations. All of the events testified to by Pare' oc-

curred during the progress of the trial, but before submission of the case to the jury. A summary of those events follows:

Six or seven jurors were sitting in the day room at the Great Lakes Naval Station where they were sequestered.[16] Juror Gogerty, later elected foreman of the jury (D.A. 2179), crossed the room to Pare' and handed him a newspaper clipping which juror Gogerty took from his wallet. Pare' read the article and returned it (D.A. 2201).

The article, set out in full at D.A. 311, was about the case, and was headlined: *Hoffa Turned Down on 2d Acquittal Plea.* It began with:

> "James R. Hoffa, president of the Teamsters union, lost a second bid for a judgment of acquittal yesterday in his 25 million dollar fraud trial in federal District Court.
>
> "'Hoffa's attorneys first sought an acquittal two weeks ago after the government had rested its case, but the move was denied by Judge Richrad [sic] B. Austin.'"

The article went on to describe the unsuccessful argument of petitioner Hoffa's counsel in support of the rejected "second bid for a judgment of acquittal" as one made "in contending his client is innocent", and based on a contension "that Hoffa's testimony on the stand . . . was sufficient proof that he acted in 'good faith'."[17]

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[16] The jury was originally sequestered in a downtown hotel. They were later sequestered in the Great Lakes Naval Station, a military reservation 36 miles from the Courthouse. From the time of this transfer until the end of the trial, the jury spent all its free time in the military compound, where all recreation—and even dental work—was carried on under the direct supervision of federal marshals, and the general supervision of the military (D.A. 574-580; P. Ex. A. 2-3).

[17] The proceedings on the two rejected motions for judgment of acquittal had, of course, taken place out of the presence of the jury.

The article concluded with a report of the trial judge's barring from evidence of the Link letters offered by the Government to discredit the testimony of petitioner Dranow. The article's description of the letters was:

> "In one of the letters, Dranow wrote that he was sorry for the troubles and would take the blame. In the other letter, he asked for a $60-a-day payoff from co-defendants and other associates."

The letters, according to the article, were excluded by the trial judge "inasmuch as [they]tend to be prejudicial against the other defendants." The trial judge, *without connecting petitioners to the letters,* had instructed the jury to disregard the letters and all testimony concerning them (D.A. 2065-6).

Besides the newspaper article in the possession of juror Gogerty, other information reached the sequestered jury from an outside source. Juror Gogerty remarked to other jurors that petitioners Strate and Hoffa "were in cahoots in Puerto Rico". (D.A. 2199, 2905, 2190). The evidence in this conspiracy trial provided no basis for juror Gogerty's statement.[18]

Finally, according to alternate juror Pare''s testimony, various jurors during the course of the trial made many statements to other jurors concerning the trial, the evidence, and the guilt of defendants. Among such statements were the following. On two or three occasions when events in the courtroom suggested cross-purposes among the defendants, juror Bernier said: "There is no honor among thieves." (D.A. 2192, 2190). On another occasion

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[18] While the jury was sequestered at the Great Lakes Naval Station, articles appeared in the Chicago daily newspapers which concerned Hoffa, Strate, and Teamster Union problems in Puerto Rico (D.A. 316-326).

juror Doughton added: "If I had a million dollars, I sure wouldn't let Hoffa get ahold of it. Might never see it again." (D.A. 2193).

On still another day, juror Siers felt that "those guys", including petitioner Hoffa, "won't look me in the eye", and concluded that "they know their goose is cooked or at least in the frying pan." (D.A. 2193, 2190). Juror Gogerty added that "you can't tell me Hoffa didn't know about" a failure to put up debentures for a Pension Fund loan. Juror Gogerty further deduced: "Dranow now sets it up, Burris does the papers, Kovens gets the construction work. That's got to be a conspiracy somewhere." (D.A. 2193-2194, 2190). And juror Gogerty concluded that petitioner Hoffa, unlike Reuther or Meany who are "tough" but "straight" or "honest", has been in trouble right from the start." (D.A. 2194, 2190). Juror Gogerty followed up those remarks a few days later with: "These bastards live their lives robbing people, parasites"; while Juror Bernier informed his fellow jurors "we spend all our damn time here, and they just appeal this thing." (D.A. 2194-5, 2190).

All of the foregoing statements by jurors were made prior to submission of the case to the jury.

The trial judge accepted as true all of the foregoing events testified to by juror Pare', without cross-examination, impeachment, or any response by the Government (D.A. 2212, 2217). Nevertheless, he denied both a new trial and any inquiry of the jurors (D.A. 2212, 2215).

The Court of Appeals found no error because:

> "There was no evidence of any outside influence on the jury and from Pare's testimony, it appears that, for the most part, the jurors followed the Court's admonition not to discuss the case among themselves until the case was finally submitted to them for de-

cision. We think, under all of the circumstances present, that these matters brought to the attention of the trial judge after verdict were not sufficient to require an inquest by the Court or the granting of a new trial . . ." (App. A, *infra,* p. 31).

E. The Prejudice Inherent In The Joint Trial With Defendant Dranow.

From the very inception of the pre-trial proceedings, in 1963, irrational conduct by defendant Dranow was brought to the trial court's attention. At arraignment, he would not enter a plea (H.D.A. 461). On June 25, 1963, his attorney informed the Court of Dranow's complaint of a visit to him in prison by Justice Department agents requesting him to give perjured testimony at the trial. Counsel stated that Dranow "is virtually half insane" (H.D.A. 462). Even Government counsel early informed the trial court that the Government feared a conflict might arise between Dranow and his counsel (H.D.A. 463-65).

Prior to commencement of trial, on April 27, 1964, counsel informed the Court that: (1) Dranow had been unable to confer intelligently with counsel; (2) Dranow had informed them that he was not physically or mentally capable of aiding and assisting in the preparation of his defense; (3) Dranow could not speak coherently; and (4) they were of the belief that Dranow could not intelligently aid and assist counsel in the preparation of his defense. They requested that the Court have Dranow examined by doctors to determine "whether or not he is mentally capable of assisting counsel in the preparation of this case" (H.D.A. 493).

On April 28, 1964, at a conference in the Court's chambers, Dranow's statements and conduct were not only irrational but he also exhibited an unwillingness to cooperate with his counsel. He also refused to be examined

in a hospital (H.D.A. 508). The Court ruled that he would defer the examination until Dranow had filed affidavits and medical reports (Tr. 299).

On Monday, May 11, 1964, the Court advised counsel that Dranow had sent a telegram to the Court requesting that he be permitted to act as his own attorney and that he be examined by Government physicians under adequate conditions and circumstances (Doc. Ex. App. 13-14).[19] When the Court showed the telegram to counsel, the lawyers for all co-defendants asked the Court for a severance in view of Dranow's mental breakdown (Tr. 2240-2243, 2252-53). They also asked that Dranow be examined (Tr. 2258).

Dranow's counsel again told the Court "the man is mentally deranged. This man cannot understand the significance of a legal point" (Tr. 2247); and suggested that Dranow be examined (Tr. 2248). Defense counsel suggested that in view of Dranow's irrational conduct, the Court should make appropriate inquiry (Tr. 2252).

Dranow was brought into the Court's chambers where the Court asked if he desired his present counsel to continue to represent him. He answered in the affirmative (Tr. 2258-2259). The Court denied the motions for severance and mental examination (Tr. 2260; D.A. 552).

During the trial, Dranow's exchanges with the prosecutor and the trial judge made impossible serious consideration of the charges. The judge made a derogatory remark about Dranow's checks being "exchanged and floated and bounced around the country," and stated that Dranow

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[19] "Doc. Ex. App." references are to the document exhibit appendix as printed for the Court of Appeals in the first appeal, and on file with this Court.

would need help to try to straighten "it" out (D.A. 1870). There were other remarks of this type by the trial judge (D.A. 1894, 1907).

Dranow's conduct during the trial was irrational. He had frequent clashes with spectators and counsel on both sides (Tr. 14135-40, 14326, 14337, 14339, 14342-43, 14373-74). He was belligerant, discourteous, vulgar, non-responsive, and his statements during his testimony were frequently incoherent (Tr. 14125, 14132, 14224, 14295-96, 14311, 14315, 14332, 14333, 14337, 14340, 14344, 14346, 14381, 14385, 14402, 14659, 14662).

Additional evidence on Dranow's competency was introduced at the eavesdrop hearing. Medical reports from the medical center for federal prisoners in Springfield, Missouri made it abundantly clear that Dranow was mentally and emotionally disturbed, suffering from severe depression and had schizophrenia of the paranoid type (Def. H. Ex. 1-A, 1-B, 1-C, 1-D; H.D.A. 190-192, 194-200, 758).

Three eminent psychiatrists testified prior to the commencement of the eavesdrop hearing that they found Dranow to be severely depressed and incompetent to participate in the hearing or confer with his counsel (H.D.A. 763-64, 775, 779). One of the psychiatrists added that there was sufficient evidence for him to arrive at a medical opinion that Dranow "has suffered paranoid delusions in the past" (H.D.A. 779).

Dranow testified at trial against the advice of his counsel (Tr. 14117-118). When he took the stand, Government counsel asked the Court to admonish him not to refer to prior convictions of any defendants (Tr. 14114). Counsel for co-defendants renewed their motion for a severance (Tr. 14116-18). Additionally a further motion was made to have Dranow examined, but the Court denied both motions (Tr. 14117).

During direct examination, Dranow stated that he was under life "sentence" (Tr. 14297); that "if it is up to Mr. Kennedy to leave me out of jail, I will be there until I die" (Tr. 14297); and that he had "been convicted three times on the same kind of monkey business" (Tr. 14295). He engaged in frequent outbursts. When asked whether he had any connection with the Teamsters Pension Fund, he replied, "Yes. I'm their representative in the prison. If the prison wants a loan, I will recommend it." (Tr. 14385-86). He stated to the prosecutor, on cross-examination, "It's about time you got wise. Say a little more and I'll mutilate you." (Tr. 14663). He, also in the presence of the jury, accused Government counsel of lying (Tr. 14661), and of suppressing evidence (Tr. 14659).

During Dranow's testimony, the motions of the other defendants for a severance from Dranow and mistrial were renewed and denied (Tr. 14376, 14386, 14664).

The Court of Appeals concluded that it was not improper to deny requests for severance from Dranow (App. A; *infra*, p. 18.)

F. Impeachment Of An Accused Through The Use Of A Non-Final Conviction For A Subsequent, Unrelated, But Highly Prejudicial Offense.

Just before presentation of petitioner's case, defense counsel sought a ruling from the trial judge on whether the Government would be permitted in cross-examination of petitioner Hoffa as a defense witness to bring out a jury tampering conviction which was then on appeal to the Sixth Circuit Court of Appeals (Tr. 13587-13590; G.A. 187-189). Adversely to petitioners' contentions, the trial judge ruled that he would permit such cross-examination (Tr. 13589-90; 13711; G.A. 189-190). Petitioner Hoffa did take the stand as a witness for the defense; and, in ac-

cordance with the trial judge's prior adverse ruling, he did, on cross-examination, admit the fact of the jury-tampering conviction then on appeal to the Sixth Circuit Court of Appeals (D.A. 2001).

Thereafter, defense counsel unsuccessfully objected to the trial judge's instruction concerning the jury-tampering conviction "consistent with the objection . . . originally made about its admissibility, since it was on appeal" (D.A. 2166; Tr. 16561-2). The prosecutor in his argument to the jury made several prejudicial references to petitioner Hoffa as "a jury tamperer" unworthy of belief (D.A. 2092-4).

The jury-tampering conviction used to impeach petitioner Hoffa related to events alleged to have occurred in the fall of 1962 when he was on trial in the "Test Fleet case".[20] All of the substantive offenses and the material facts of the conspiracy in the present proceeding are charged to have occurred from 1958 to 1961, or from nine months to several years prior to the events of the jury-tampering charge (D.A. 4177). Nevertheless, the Government succeeded in delaying the trial below until completion of the jury-tampering trial.

The indictment for jury tampering was filed in May, 1963, a few weeks before the filing of the present indictment in June, 1963. However, the present indictment was in large part a successor indictment to those filed against petitioner Hoffa in the Federal Court at Orlando, Florida, almost three years earlier in December 7, 1960 and Octo-

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[20] See generally this Court's opinion in *Hoffa* v. *United States*, 385 U.S. 293.

ber 11, 1961.[21] Efforts by petitioner Hoffa in 1962 and 1963 to secure trial or dismissal of the Orlando predecessor indictments were resisted by the Government until the filing of the jury-tampering indictment and the present indictment. The Government then secured dismissal of the Orlando indictment by reason of the filing of the present indictment (D.A. 345-347).

At arraignment in the instant case, all petitioners requested an immediate trial, and agreed to waive all pretrial motions. Thereafter, petitioners repeatedly moved for an immediate trial, but the Government successfully resisted all of these efforts, although only petitioner Hoffa, of these petitioners, was charged in the jury-tampering case (D.A. 342, 343, 344-346, 348-351, 364-368).

G. The Removal Of A Juror Without Ascertaining Whether He Had Become Unable, Or Disqualified, To Perform His Duties.

After the close of the Government's final argument, the trial court advised petitioners that the 92-year old mother of juror Lee had fallen, broken her hip, and had major surgery the day before. The juror was told that his mother came out of the operation very well. He did not request discharge from the jury. (D.A. 2106). The doctor advised the marshal that the mother was doing very well, but that due to her age she could suffer a relapse at any time. Although there was no actual way of telling, the doctor doubted that she would ultimately leave the hospital alive. (Tr. 16404). But he did not expect her to die in the immediate future. (D.A. 2106).

The Court advised petitioners that unless they unanimously agreed to proceed with eleven jurors in the event Lee's mother died, he would substitute an alternate before the jury began its deliberations. (D.A. 2094, 2101).

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[21] This view was also held by Judge Austin who related the indictment at issue back to the prior indictments. (App. E, *infra*, p. 79).

Petitioners declined so to agree, and requested that inquiry be made of the juror as to the state of his feelings in the matter. They objected to his removal without such inquiry of him. The Court refused inquiry, and replaced the juror. (D.A. 2102-03). The juror's mother did not die before the jury reached its verdict.

H. Multiple Schemes And Conspiracies, And Irrelevant Transactions Presented As One Single Scheme And Conspiracy To Defraud.

The majority and dissenting opinions of the Court of Appeals agreed that the common object or design of the claimed scheme and conspiracy was to obtain money for the purpose of relieving the financial distress of Sun Valley, Inc., a real estate development company, for petitioner Hoffa's benefit (App. A, *infra,* pp. 12, 50). This conclusion was adopted by this Court in its *per curiam* opinion remanding the case to the District Court for further proceedings. 387 U.S. 231, 232.

The evidence, more fully set forth in the dissenting opinion below (App. A, *infra,* pp. 46-70), may be briefly summarized as follows:

Sun Valley, Inc. On July 2, 1958, the beginning of the alleged scheme and conspiracy, a Florida bank was holding $400,000 of the funds of the Detroit local union of which Hoffa was president. The bank claimed that these funds were security for a loan to Sun Valley, Inc. At this time, Sun Valley was in financial distress and undergoing reorganization proceedings (D.A. 556, 588, 589, 597, 601, 602). The Government claimed that prior to the Sun Valley reorganization, Hoffa had an interest in it (See *e.g.*, D.A. 44, 619, 1979-1982). Petitioners Dranow and Burris, together with others not claimed to be conspirators, took steps to reorganize and refinance Sun Valley

(D.A. 1403, 1405, 1554-55). The Government adduced evidence that Kovens, Hyman and Strate invested in or contributed money to this refinancing (D.A. 894-95, 1084, 1408, 1414; Govt. Ex. 153-8, 494). The Government claimed that $100,000 of the fees and other benefits which Dranow and Burris allegedly received for helping to obtain the Everglades, Key West, Fontainebleau, First Berkeley and other loans was a portion of the $550,000 which was provided to refinance Sun Valley. By June 27, 1960, all of Sun Valley's obligations had been paid, the trusteeship dissolved, and Sun Valley had been succeeded by Union Land and Home Company. Furthermore, the Detroit local union had been repaid its $400,000 by the Florida National Bank (D.A. 1401-02; Govt. Ex. 22).

The following is a brief description of the individual loans alleged in the indictment and upon which evidence was adduced below:

First Everglades Loan. The Fund loaned Vaughan B. Connelly 3.3 million dollars in January, 1959 to remodel the Everglades Hotel in Miami, Florida (D.A. 688, 690, 802-803). Dranow was alleged to have received a finder's fee for obtaining this loan (D.A. 629, 658-59). Burris assisted in preparing the application for the loan (D.A. 629). Kovens was the contractor (D.A. 624-26). The Government failed to prove material misrepresentations to, or fraud on, the Fund in the obtaining of this loan (App. A, *infra,* pp. 53-54). The indictment did not contain a substantive count based upon this loan.

Second Everglades Loan. A second loan of one million dollars was made to the Everglades Hotel in July, 1959. Dranow and Burris assisted with the application for the loan (D.A. 663, 667). Kovens' only connection with this loan was as the contractor for the project. There was no

allegation or evidence of direct misrepresentations to or fraud on the Fund in the obtaining of this loan (App. A, *infra,* p. 54). Petitioner Strate and defendant Hyman had no connection whatsoever with either loan to the Everglades. There was no evidence that the proceeds of either of these loans were used in refinancing Sun Valley (App. A, *infra,* p. 54). Contrary to the majority opinion below App. A, *infra,* p. 10), there was no evidence that the $15,000 invested by Connelly in Sun Valley came from Fund loan proceeds (G.A. 165).

First Fontainebleau Loan. In July, 1959, the Pension Fund loaned the Pelican State Hotel Corporation, owned in part by petitioner Strate, $1,350,000 to enlarge the Fontainebleau Hotel in New Orleans, Louisiana (D.A. 1063-64, 1066). Defendant Dranow assisted with the application for the loan, and the Government adduced evidence that he received a finder's fee for his efforts (D.A. 1062, 1067-68, 1103-04). There was no evidence of any material misrepresentations to, or fraud on, the Fund in the obtaining of this loan.

Second Fontainebleau Loan. An additional $2,325,000 was loaned to the hotel in February, 1960 (D.A. 1078, 1518). Burris and Dranow assisted in preparing the application for this loan, and the Government adduced evidence that Dranow received a finder's fee (D.A. 1069). There was also evidence of misrepresentations to the Fund in connection with this loan. (D.A. 1075, 1155-56).

Third Fontainebleau Loan. A third loan of $500,000 was granted in December, 1960 (G.A. 127). Again, Burris and Dranow assisted in the preparation of the application (D.A. 1068-1072). There was evidence of misrepresentations. The loan was granted after the rehabilitation of Sun Valley (App. A. *infra,* p. 55; G.A. 127).

Fourth Fontainebleau Loan. A fourth loan of $500,000 was made to the hotel in March, 1961 (G.A. 127). Burris and Dranow assisted in preparing the application for the loan (D.A. 1068-1072), but there was no evidence of any misrepresentations to, or fraud on, the Fund in connection with the loan. The loan was granted almost one year after Sun Valley had been rehabilitated. The indictment did not contain a substantive count based upon this transaction.

Kovens and Hyman were not connected in any way with any of the four Fontainebleau loans. (App. A, *infra,* p. 55).

First Key West Loan. In July, 1959, the Pension Fund loaned $875,000 to the Key West Foundation Company, owned partially by petitioner Hyman. Burris assisted in obtaining the loan (D.A. 1683). The sum of $275,000 was to be used to pay off an existing mortgage on land owned by the company and to construct a small shopping center. No limitation was placed on the use of the balance of the proceeds. (Tr. 11266-11271). The District Court directed a verdict of acquittal for the defendants on the substantive count relating to this loan for failure to prove any material misrepresentation (D.A. 878, 1773). The evidence, however, was not stricken.

Second Key West Loan. A $400,000 loan to Key West was approved in June, 1960 for the remodeling of the Poinciana Apartments (G.A. 132-34; D.A. 1497). The proceeds of this loan were not disbursed until after Sun Valley had been rehabilitated (G.A. 135-38; Govt. Ex. 410; App. A, *infra,* p. 57). Kovens and Strate were not connected with these two loans in any manner.

LaConcha-Casa Marina Loans. In January, 1962, the Fund loaned Hyman a total of $650,000 for the purchase of the LaConcha and Casa Marina Hotels in Key West, Florida (G.A. 297-303, 304-310). No finder's fees were paid in connection with these loans. The proceeds were disbursed

almost two years after Sun Valley had been rehabilitated The indictment did not allege any misrepresentation to the Fund in obtaining these loans. The Government, however, adduced evidence of claimed misrepresentations (D.A. 882-84; G.A. 300, 307). Kovens, Strate and Dranow were not connected with these loans. (App. A, *infra,* p. 57).

The Initial First Berkeley Loan. In January, 1960, the Pension Fund loaned the First Berkeley Corporation, owned by Burris, $266,000 to acquire the Beverly-Wilshire Health Club in Los Angeles (D.A. 1562). The Government conceded at trial that no misrepresentations were made in connection with this loan (Tr. 10627-28). No finder's fees were paid, and no connection with Sun Valley was shown. (App. A, *infra,* pp. 58-59).

The Second First Berkeley Loan. In March, 1960, the Fund granted an application for an additional $2,966,000 loan to purchase the Cornell Buildings in Los Angeles (G.A. 271-72). The Government adduced evidence of misrepresentation (D.A. 1223, 1384-85, 1419). The evidence did not connect this loan with the rehabilitation of Sun Valley.

The Third First Berkeley Loan. This loan of $300,000 for improvements to the Cornell Buildings was disbursed in April, 1961, almost one year after the rehabilitation of Sun Valley (D.A. 799). There was no evidence of any material misrepresentations to, or fraud on, the Fund in connection with this loan. The District Court directed a verdict of acquittal on the two substantive counts relating to this loan (D.A. 39). The evidence with respect thereto was not stricken. (App. A, *infra,* p. 59).

Hyman, Strate and Kovens were not connected with the three First Berkeley loans. However, Burris pledged some stock which belonged to Kovens, as collateral for the second loan (G.A. 315, 351).

The First Good Samaritan Loan. In September, 1959, the Fund granted a loan to Good Samaritan Hospital, Inc., owned by one Burt Sager, to finance the construction of a hospital (D.A. 1303-05; Govt. Ex. 181-17). Proceeds of the loan were not disbursed until November, 1960 (Govt. Ex. 181-15, 182-3). Burris assisted Sager's accountant in preparing the application for the loan (D.A. 1303-04). During the trial the Government conceded that all of the proceeds of this loan, as well as of the second loan, were properly used to build the hospital (Tr. 15295-96, 15299). The evidence as to materiality of alleged misrepresentations was equivocal (App. A, *infra,* p. 60).

The Second Good Samaritan Loan. A second loan of $500,000 was granted to Good Samaritan in June, 1961. (Govt. Ex. 178-26). There was no evidence of any material misrepresentations to, or fraud on, the Fund in connection with this loan App. A, *infra,* p. 60).

Strate, Hyman and Dranow had no connection with the Good Samaritan loans.

4306 Duncan Corp. Loan. In December, 1959, the Fund loaned $849,000 to the 4306 Duncan Corp., which was owned by Fred Strecker, a Pension Fund Trustee. Although the Government adduced evidence of misrepresentations (D.A. 1336-49), the loan had no relation to Sun Valley, and no fees were paid in connection with it. No petitioner received any benefit from it. Dranow and Burris assisted Strecker in obtaining this loan (D.A. 1339-41, 1343-45, 1367-73). Kovens, Strate and Hyman had no connection with with it (App. A, *infra,* pp. 61-62).

The Miracle Plaza Loan. In June, 1960, the Fund granted a loan of $1,100,000 to refinance mortgages on the Miracle Plaza Shopping Center in Vero Beach, Florida (D.A. 756). Petitioner Kovens was associated with Miracle Plaza. There was no evidence of any misrepresentation to, or fraud on, the Fund in the obtaining of this

loan, nor was it linked to Sun Valley. The substantive count relating to this loan was dismissed for failure to prove fraud (App. A, *infra,* p. 65). The evidence was not stricken. No other petitioner was shown to be connected with this loan.

The Miami International Airport Hotel and the Birmingham Airport Motel Loans. In 1959, the Fund loaned $2,000,000 to Airport Hotel, Inc. for the construction of the Miami International Airport Hotel. In 1961, a second loan of $1,000,000 was made to the Birmingham Airport Motel in Birmingham. A Miami accountant, George Simon, was involved in these ventures (D.A. 1179-80, 1182-85). Burris assisted Simon in obtaining each loan, for which he received a fee (D.A. 1181-82, 1182-85). There was no evidence of any misrepresentation to, or fraud on, the Fund in conjunction with these loans, or of any relationship with Sun Valley. Strate, Hyman and Kovens were not connected with the loans. (App. A, *infra,* pp. 66-67).

The Club 300 Loan. The Fund loaned $900,000 to Club 300 in 1961 to finance a motel and bowling alley (D.A. 1392, 1411). There was no evidence of any misrepresentation to, or fraud on, the Fund in connection with this loan. The Government dismissed the substantive count relating to this loan at the conclusion of the case for failure to prove fraud (App. A, *infra,* p. 67). There was no relationship between this loan and Sun Valley. Kovens, Strate and Hyman were not connected with this loan.

The Causeway Inn Loans. Loans of $1,500,000 and $350,000 were granted in late 1960 and 1961, respectively, to construct a motel in Tampa (D.A. 1295, 1384, 1389). In January, 1963, a third loan in the amount of $1,000,000 was granted for the expansion of the motel (D.A. 1540-50). The Court entered a judgment of acquittal on the substantive count relating to the first two loans for failure to

prove fraud (App. A, *infra,* p. 68). No substantive count related to the third loan. There was no evidence of any misrepresentation to, or fraud on, the Fund in obtaining any of these loans. Burris received a fee for assisting in obtaining these loans (D.A. 1390-91; Govt. Ex. 672, 673). Kovens' only connnection with the loan was that he was hired as the contractor after the loans were granted (D.A. 1388). Strate and Hyman were not connected with these loans in any manner.

Petitioner Hoffa was one of 16 trustees of the Pension Fund. As such, he had one vote in regard to each loan application. It was only as such trustee that petitioner Hoffa functioned in the matters involved herein. He had no interest in any of the business ventures to which the Fund made loans. Petitioner Weinblatt was not shown to be connected with any of the loans. Dranow maintained some of his bank accounts in Weinblatt's name. The proof of that fact was the only evidence relating to Weinblatt.

There was no evidence that the Fund lost any money on any of the loans. There was a default and foreclosure only on the Everglades loans (D.A. 676). All of the fees mentioned in the evidence were paid by the recipients of the loans; none was paid by the Fund itself.

The convictions were affirmed below by a two-to-one decision. The majority held: (1) "The Government had the burden to prove that the defendants conspired to and did devise a scheme to defraud the Pension Fund by submitting false and fraudulent representations and concealing material facts from the Pension Fund trustees and staff in order to obtain Pension Fund loans"; (2) ". . . the central purpose of the conspiracy and scheme was to 'bail out' Sun Valley"; (3) "the burden also rested on the Government to demonstrate that the central object of the conspiracy was to obtain money for the purpose of 'bailing out' Sun Valley . . ."; and (4) ". . . the proof in

this case was sufficient for the jury to find that a single conspiracy did exist and that each defendant was a knowing member of it . . .". (App. A, *infra,* pp. 11-12).

However, the majority did not discuss at all the petitioners' contentions that much of the evidence adduced by the Government was irrelevant to the charge of fraud, or to the common object of the scheme and conspiracy charged, or to both. Further, the majority did not undertake to demonstrate how the twenty-one separate loans transactions proved one single scheme and conspiracy among all of the petitioners.

The dissenting judge devoted twenty pages of his opinion to a consideration of these issues. The dissent concluded: (1) "The preceding analysis relating to several of the loan transactions charged to be part of a single conspiracy demonstrates that no common design bound all of the defendants together"; (2) There were "multiple subsidiary conspiracies . . ."; (3) ". . . the prosecution was allowed to proceed on the theory that a generic description of the substantive crime which the defendants were alleged to have conspired to commit was a sufficient common objective so as to make each defendant a co-defendant with the others named in the indictment"; (4) ". . . a great amount of irrelevant, immaterial evidence was admitted against the defendants"; (5) ". . . a substantial number of the loan transactions as to which evidence was offered and received had no logical tendency to prove either the existence or the execution of the scheme to defraud the Pension Fund charged in the indictment, or for that matter, any scheme to defraud the Pension Fund"; and (6) ". . . an intense study of the record convinces me that this prosecution was designed to charge a sprawling, amorphous scheme and conspiracy in order to allow the presentation of a series of confusing, complex transactions and to abet the introduction of a mass of immaterial, prejudicial evidence." (App. A, *infra,* pp. 62-67).

REASONS FOR GRANTING THE WRIT

I.

Government's Knowledge Of Facts Gained Through Illegal Electronic Eavesdrop Was Used To Tailor Its Evidence To Destroy The Defense.

Following an ever increasing number of governmental confessions of illegal electronic eavesdropping, *Black* v. *United States*, 385 U.S. 26; *Schipani* v. *United States*, 385 U.S. 372; *O'Brien* v. *United States*, 386 U.S. 345, requiring reversals of the convictions below, this Court in this case ordered, for the first time, that the District Court hold an evidentiary hearing to determine whether such governmental illegality "tainted" the convictions, 387 U.S. 231. This case thus presents for this Court's review, again for the first time, the results of such a hearing. It also presents the unique issue of whether the convictions are "tainted" when the use made of such illegality was to intercept an otherwise unknown defense of the accused and to consequently fashion the government's case so as to wither the thrust of that defense.

Curiously, the Government in its admission to this Court regarding the illegal overhearing chose not to submit to this Court either the log of the intercepted conversation or either of the two summaries thereof. Rather, it chose to submit only an innocuous one paragraph resume' of the entire conversation (Br. in Opp. 64-65). Until now, this Court was uninformed of the marginal notations and impressions placed on the summary by the Government's prosecutors below and was uninformed that a significant Government witness in the trial had actually prepared the summaries of the eavesdrop. Indeed, the facts of the actual use of the contents of the interception were withheld

from this Court as was the fact that nine *other* conversations of defendants were illegally intercepted by the Government. Also, the Government chose to conceal a number of intercepted conversations of defense counsel.

This cavalier attitude of the Government cries out for the application of this Court's supervisory powers to delineate what safeguards are to be established to prevent the erosion of the constitutional rights of persons accused of crime by those sworn to enforce the law and to forestall future piecemeal disclosures of illegal Government activities, which separately could have the appearance of inconsequentiality but collectively affect substantial constitutional rights.

The majority of the Court of Appeals found that the convictions were not tainted by the illegal evidence (App. F, *infra,* p. 96). In apparent support of this conclusion, the opinion asserts that the "detailed" indictment was returned six months before the overhearing, spells "out in detail the roles played by each of the defendants", mentions all the proven loan transactions, and thus such particularity could not "have been obtained from a cryptic half-hour conversation which occurred six months after the indictment had been returned" (App. F, *infra,* p. 97). In addition, the Court below apparently urges that in order to "taint", the overhearing must be "the product of [an] investigation conducted as to [a] defendant in this case" (App. F, *infra,* pp. 97-98).

These criteria, we submit, cannot be the standards by which "taint" is to be viewed. The use to which the overhearing is put need not have any relation to the formulation of the indictment. Moreover, to urge that the overhearing must be directed to the defendant in the case emasculates the import of the Fourth Amendment and the

due process clause of the Fifth Amendment. Such a position promulgates the doctrine that evidence discovered incidental to an illegal search directed against a third party, but which *belongs* to the defendant, is nevertheless admissible evidence. Certainly, this Court cannot permit such an opinion to sweep away the substantial authority to the contrary. *Jones* v. *United States,* 362 U.S. 257; *Mancusi* v. *Deforte,* 392 U.S. 364; *Simmons* v. *United States,* 390 U.S. 377.

The eavesdrop also bared to the prosecution additional theories of defense, which could be evaluated and accepted or rejected in tailoring the prosecution, in light of facts already known. For instance, the summary related that Sigelbaum knew an attorney named Bill Manheight who would be a good defense witness and that Manheight would testify he met Burris in connection with a Fund loan, that he had a difficult time getting a loan, and that he had to put up additional collateral. With regard to such contemplated defense, trial prosecutor Poretz wrote upon the summary of the log of the interception, "such testimony would not be admissible." (See *supra,* p. 19).

That portion of the summary which referred to Burris' statements that if the witness in this case spoke the truth they would say there was no conspiracy, that no one was promised anything, that the loans had to be approved before a disinterested board, and that the properties were all properly appraised with extra collateral required in many cases, was considered significant by the Government. This is evidenced by the fact that someone penciled brackets around this portion of the summary. (See *supra,* p. 19). The Government may have been aware of these safeguards; yet through the eavesdrop, its suspicions that this defense would in fact be interposed at the trial were confirmed.

Moreover, the overhearing disclosed a proposed defense that defendant Hyman, upon first obtaining pension fund loan proceeds, used them differently than their represented purpose, but that ultimately they were so used. The summary of the interception reflects this information with italicized references. This summary bears notations and comments in the margin of the document placed there by Government attorneys and particularly with the handwritten notation, "Does this check out?"

FBI Agent Connors who had prepared the summary from the eavesdropping log had prepared accounting analyses of the Hyman borrowings and testified to them at trial. As a result of his consultations with the prosecutors, he had originally prepared those schedules to encompass a period of time which would disclose that Hyman had ultimately used the loan proceeds for the purposes for which they were obtained. Subsequently, when the nature of the defense became known through the eavesdrop, Government trial counsel instructed him to exclude from his previously prepared accounting analysis the subsequent expenditure of the funds. In addition, his prior worksheets were destroyed.

The dissent below unequivocally maintained the foregoing circumstances established that when the Government gained knowledge of the proposed defense, "Agent Connors, pursuant to the directions of the Government prosecutors, tailored his accounting summary and his testimony. Thus, the Government attempted to forestall or destroy the defense indicated in the overheard conversation. . . ."(App. F, *infra,* p. 112). The majority said no more than "taint" was non-existent because of the preexistence of the detailed indictment and because the overhearing was not directed against any defendant. (App. F, *infra,* pp. 96-98).

The importance for this Court to enunciate the proper standards for "taint" is unmistakable. Should this Court fail to undertake a review of this issue, the effective principle of the Seventh Circuit's decision would remain the law in this area, i.e., information learned through an illegally overheard conversation of the defendant and used by the Government to "tailor" its case to forestall or destroy a defense disclosed thereby, is not "taint" affecting the convictions. This cannot and should not remain the law. This Court should both exercise its supervisory powers for the effective administration of justice as well as to establish the appropriate standards for determining "taint" from illegal electronic eavesdropping by granting the petition for certiorari in this case.

II.

The Unilateral Usurpation by the Government of the Court's Function of Determining Whether Documents Are Producible Under 18 U.S.C. §3500.

But for the remand and hearing ordered by this Court, petitioners would never have discovered the fact that the Government had withheld at trial three vital and material documents clearly required to be produced under the disclosure provisions of 18 U.S.C. §3500. The circumstances surrounding this huggermuggery clearly reveal that the concealment was not inadvertent, but an intentional deception in which the prime architect was Agent Connors, who figured so prominently in the use of the eavesdropped conversation and the attendant tailoring of the prosecution. At trial, Connors emphatically denied making any reports during his investigation (H.D.A. 594). Persistent defense efforts to learn of the existence of such reports at trial were fruitless (H.D.A. 594, 598). The plain fact is, however, as the dissenting opinion of the Court of Ap-

peals pointed out, that "agent Connors lied on the witness stand . . ." (App. F, *infra,* p. 116). Not until three years later, at the hearing ordered by this Court, was it disclosed that Connors had in fact prepared three reports.

These reports which were concealed from the Court, the jury, and the defense were directly relevant to this case. Two of the reports were Connors' summaries of this electronically overheard Burris-Sigelbaum conversation. The third related to his September, 1963 conference with the trial prosecutors and set out the type of accounting summaries which Connors was to prepare for use at the trial. (H.D.A. 221-224). It specifically stated that a decision had been made that his trial charts for the Key West project were to include disbursements through April 30, 1961.

None of these reports were submitted by the Government to the District Court during the trial for a determination as to whether they came within the purview of section 3500, so as to require delivery of the same to the defense. The Government thus clearly, in an *ex parte* manner unilaterally determined, without any judicial supervision, that the documents did not constitute statements within the meaning of the statute, and, that in any event, they did not relate to the matters to which the witness had testified on direct examination. The decision of the majority of the Court of Appeals, in condoning the Government's unilateral usurpation of the trial Court's function, is in conflict with this Court's decisions in *Rosenberg* v. *United States,* 360 U.S. 367 and *Palermo* v. *United States,* 360 U.S. 343, and with the decisions of other Courts of Appeal in *Bary* v. *United States,* 10 Cir., 292 F. 2d 53, and *Duncan* v. *United States,* D.C. Cir., 379 F. 2d 148; *cf., Kolod* v. *United States,* 390 U.S. 136, where this Court held Government's *ex parte* determination of relevancy was insufficient.

Rosenberg and *Palermo* hold that the District Court and not the Government must determine whether a statement is producible. This Court stated in *Palermo* that when it is doubtful whether a particular document or report must be submitted to the defense, the document should be submitted to the trial judge for *in camera* inspection, and that "any other procedure would be destructive of the statutory purpose." 360 U.S. at 354. The Jencks Act certainly did not grant to the Government the power to decide unilaterally whether a particular report of a Government witness is a statement within the language of the statute, and whether it is material to the testimony of the witness. *Bary* v. *United States, supra.* See also, *Campbell* v. *United States,* 365 U.S. 85, 107, *United States* v. *Berry,* 7 Cir., 277 F. 2d 826, *United States* v. *Sheer,* 7 Cir., 278 F. 2d 65, *Augenblick* v. *United States,* Ct. Cl., 377 F. 2d 586, 603.

The decision of the majority of the Court of Appeals, that the reports did not relate to Connors' accounting testimony, and that there was not a statement within the requirements of 18 U.S.C. §3500, is clearly erroneous. Connors testified at trial as to expenditures made by the Key West Foundation, and stated that his trial charts were intended to reflect "what was truly spent for building improvement." (H.D.A. 587). Certainly, the October 8, 1963 memorandum relating to the Key West expenditures which the prosecutors had instructed Connors to insert in his trial charts, was clearly relevant to his trial testimony. Similarly, his summary reports of the Burris-Sigelbaum conversation, relating to the manner in which Key West expenditures had been made by co-defendant Hyman, were obviously pertinent to the very crux of his testimony. Unmistakably, had the Government submitted such reports and memoranda to the defense, the cross-

examination of Connors with regard to his earlier preparation of charts under instruction of trial counsel (the October 8, 1963 report), and his subsequent destruction of these charts and the preparation of new charts again under the instructions of trial counsel but after preparation and distribution of his summary reports of the eavesdropped conversation, would have been devastating. His testimony would have been clearly impeached.

Moreover, the indictment charged that the purpose of the conspiracy was that the money borrowed from the Pension Fund was to be used for purposes other than those represented to the Fund at the time of borrowing. (See Indictment, par. 11(f); D.A. 53-54). Since Hyman did spend the money as represented to the Fund, but in 1961 rather than 1960, the Court of Appeals erred in its decision that the manner in which "Hyman spent the money in 1961 is irrelevant".

In any event, an appellate court "should not confidently guess what defendant's attorney might have found useful for impeachment purposes in withheld documents to which the defense is entitled." *Rosenberg* v. *United States,* 360 U.S. at 371.

While every violation of the Jencks Act does not, in and of itself necessarily amount to a violation of due process, *Scales* v. *United States,* 367 U.S. 203, 257-58, nevertheless, where, as here, the statutory violation by the government's decision to withhold the documents so fatally infected the proceedings, petitioners were unconstitutionally deprived of a fair trial. This Court has held that the demands of the Due Process Clause must be carefully weighed when an accused in a criminal trial seeks evidence within the prosecution's control which is important to his defense. See, *Brady* v. *Maryland,* 373 U.S.

83, 87; *United States* v. *Reynolds,* 345 U.S. 1, 6; *United States ex rel. Touhy* v. *Ragen,* 340 U.S. 462, 469. This constitutional inquiry is integral to our system under which the Government, which prosecutes an accused, also shares the responsibility of assuming that justice is done. *Jencks* v. *United States,* 353 U.S. 657, 671.

In *Jencks* this Court held that "justice requires" that defendants at a criminal trial obtain prior statements of a witness which relate to his testimony, 353 U.S. at 689. The deliberate withholding of material intrinsic to the impeachment of a critical government witness so seriously prejudiced the defendants as to raise the prosecution's refusal to afford examination of the documents by the court to a violation of constitutional demands. Cf., Mr. Justice Brennan's concurring opinion in *Palermo* v. *United States,* 360 U.S. at 362-63. By reason of the Government's intentional deception in withholding not only from the defense but, from the Court as well, all knowledge of these crucial documents, and by reason of the Court of Appeals' clear departure from established interpretations of the Jencks Act, this Court should review the judgments here under consideration.

III.

Government Suppression of Evidence Favorable To the Defense.

The Court of Appeal's decision advances a new interpretation and application of this Court's principle enunciated in *Brady* v. *Maryland,* 373 U.S. 83. For the first time, a Court of Appeals holds that the right to due process as therein viewed, does not require reversal where the prosecution has suppressed evidence favorable to the accused, only because matters "were not used at the trial" and because "they did not lead to any other evidence which

was used at the trial." (App. F, *infra* p. 100) This new and unique rule, by its very terms, permits and sanctions the government's suppression of evidence favorable to the accused, since such "favorable" evidence would obviously not be used by the prosecution at trial and would not necessarily lead to other evidence *used* at trial.

By its very terms, *Brady's* principle pertaining to suppressed favorable evidence obviates matters actually used at the trial since they would not be suppressed. Yet, the Court of Appeals would insist on the use of material at trial as a prerequisite to the application of *Brady*. This holding is completely contrary to all existing judicial views interpreting the scope of the due process clause of the Fifth Amendment. *Giles* v. *Maryland,* 386 U.S. 66; *Guerrero* v. *Bets,* 5 Cir., 384 F. 2d 886; *Barbee* v. *Maryland,* 4 Cir., 331 F. 2d 842; *United States* v. *Poole,* 7 Cir., 379 F. 2d 645.

The *Brady* decision is the culmination of a series of cases in which this Court has proscribed the active suppression of exculpating or favorable evidence, *Napue* v. *Illinois,* 360 U.S. 264; *Alcorta* v. *Texas,* 355 U.S. 28; *Pyle* v. *Kansas,* 317 U.S. 213; *Mooney* v. *Holohan,* 294 U.S. 103, for the right of the accused to have evidence material to his defense cannot depend upon the benevolence of the prosecutor.

The decision of the Seventh Circuit, however, would effectively foreclose the application of *Brady* to impeaching materials, since they would not be used at trial by the prosecution. Yet, it would otherwise seem clear that this Court's interpretation of due process detailed in *Brady* applies to evidence which is materially favorable to the accused either as direct or impeaching evidence. See, *Williams* v. *Dutton,* 5 Cir., 400 F. 2d 797, 800. Furthermore, Mr. Justice Fortas in his concurring opinion in *Giles* v. *Maryland,* 386 U.S. 66, 100 indicated that the prohibition against the prosecution's suppression should apply

"regardless of whether it relates to testimony which the State has caused to be given at the trial".

The government had unquestionably withheld from the defense at trial the log of the eavesdropped conversation and the two summaries of the log prepared by F.B.I. agent Connors. The sole and exclusive basis for the Court of Appeal's denial of the application of *Brady* v. *Maryland*, *supra* is their conclusion that the logs and summaries were not used at trial and did not lead to other evidence used at the trial. That the contents thereof did in fact contain information material to the guilt (or lack thereof) can hardly be disputed (see, *supra* pp. 58, 60-63). But the Court of Appeals never reached that issue and thereby established a new and totally unwarranted engraftment upon the *Brady* doctrine.

It can hardly be doubted that the government's suppression affected the defendants' Constitutional rights. As Judge Swygert said in his dissent below.

> ". . . the wilful suppression of these reports by the Government, standing alone, would seem to lead to the conclusion that the defendants' due process rights were violated. This conclusion is strengthened when the fact that agent Connors lied on the witness stand is also considered. Although agent Connors emphatically denied at the trial that he had made any reports during his investigation, he had in fact prepared and circulated the three reports in question, as he admitted at the hearing." (App. F, *infra* pp. 115-116)

Unless this petition is granted, the opinion of the Seventh Circuit will stand as authority for a principle which thoroughly and totally emasculates this Court's interpretation of the due process clause of the Fifth Amendment. This case offers the opportunity to re-establish and affirm the principle that wilful governmental suppression of evidence material to the guilt or innocence of the accused shall not be countenanced.

IV.

The Principle of Chapman v. California Should Not Be Amended to Permit the Test of a Mere Prima Facie Showing That an Illegal Electronic Eavesdrop of Defendants' Conversations Did Not Taint Their Convictions.

Following this Court's remand to the District Court for a determination of whether "the conviction of any of the petitioners was tainted" (App. D., *infra*, p. 76), the district judge undertook to define "the fence lines" of the hearing (H.D.A. 797). He ruled that the government had the burden of showing that no tainted evidence "was relevant to the conviction" (H.D.A. 793) and that such burden could be met by a *prima facie* establishment that the government had prior knowledge of the facts contained in the eavesdrop and "that there were no other electronic trespasses which aided in the conviction in this case" (H.D.A. 797). Based exclusively upon his imposition of the *prima facie* test of the government's proof he found "that the convictions of none of the defendants were tainted by the use of evidence improperly obtained" *United States* v. *Hoffa*, 273 F. Supp. 141, 147 (N.D. Ill.).

The Court of Appeals acknowledged the District Court's use of this test, and in apparent acceptance agreed with the conclusion based upon the *prima facie* criterion that the convictions were not "tainted" (App. F., *infra*, pp. 93, 96).

There can be no doubt that the foundation stone of this Court's remand was the evaluation of an admitted federal constitutional infraction upon the rights of the defendants. While it is true that some constitutional errors may, in the setting of a particular case, be so unimportant and insignificant that they be deemed harmless and not require the automatic reversal of the conviction, yet this Court has stated "before a federal constitutional error can be held

harmless, the Court must be able to declare a belief that it was harmless *beyond a reasonable doubt,*" *Chapman* v. *California,* 386 U.S. 18, 24 (emphasis added).

The principle of *Chapman* v. *California* has as equal an application to this admitted Fourth Amendment violation, where the government claims no use to have been made of the information obtained, as it does to those Fourth Amendment situations where the evidence was in fact used at trial but is claimed not to have been acquired in violation of the protection against an unreasonable search and seizure. See, *Ethington* v. *United States,* 6th Cir., 379 F.2d 965, 966; *United States* v. *Beard,* 6th Cir., 381 F. 2d 325, 327; *Thompson* v. *United States,* 9th Cir., 382 F. 2d 390, 393; *United States* v. *LaVallee,* 2d Cir., 391 F. 2d 123, 125.

It would appear that the Courts below have here carved out an exception to the *Chapman* rule when the federal constitutional violation to be considered is a post-indictment illegal electronic eavesdrop. There is no valid legal or practical reason for such a distinction. If the *Chapman* rule is to have different applications depending upon the facts and nature of the constitutional breach, then it should be this Court to establish that dichotomy. Since this appears to be the first case after *Chapman* deviating from the standard therein set forth, the petition for the writ should be granted so that this Court may clearly enunciate the breadth of the *Chapman* principle.

V.

The Denial To The Defense Of Additional Admitted Illegal Overhearings Of Defendants' Conversations.

At the hearing on remand, the Government concealed from the defense the contents of nine additional illegal overhearings of the petitioners. The denial to the defense

of access to such overhearings was condoned both by the District Court (App. E, *infra*, pp. 79-80), and by the Court of Appeals (App. F, *infra*, p. 94). Both Courts examined such overhearings *in camera*, and found them not to be relevant to the transactions and evidence on which petitioners were convicted.

Significantly, these now admitted overhearings were not disclosed by the Government when it informed this Court of its overhearing of the Burris-Sigelbaum conversation. Not until the hearing on remand, did it reveal that it had in its possession nine additional illegal overhearings of "some of the defendants".

The propriety of the District Court's *in camera* inspection of these overhearings and its refusal to disclose them to petitioners is now before this Court in *Alderman* v. *United States*, No. 133, O.T. 1967 (originally docketed as *Kolod* v. *United States*), presently pending on the Government's motion to modify this Court's decision. In its original *per curiam order*, 390 U.S. 136, this Court held that the Government could not determine *ex parte* whether illegally overheard conversations of a defendant were arguably relevant to a conviction, and that such determination could be made only "in an adversary proceeding in the District Court". The Government has now asked this Court to modify its order, by permitting the Government to submit the logs of the illegally monitored conversations to the District Court *in camera*, and then having the Court deliver to the defense only those logs which the Court found to have some relation to the prosecution. Such request by the Government is based on no legal foundation, and would in fact violate the defendants' basic constitutional rights under the Fourth, Fifth, and Sixth Amendments. We believe that at a minimum petitioners are entitled to have produced for their own inspection all records

in the possession of the Government of its admittedly illegal interceptions of petitioners' own conversations. Accordingly, certiorari should be granted here so that this case may be reviewed in the light of this Court's decision in *Alderman.*

VI.

Government's Unlawful Intrusion Into Conversations of Defense Counsel And Investigators.

This Court's mandate that a hearing be held relating to the contents of not merely the eavesdropped conversation admitted by the Government, but "any other electronically eavesdropped conversations", *Hoffa* v. *United States,* 387 U.S. 231, 233 (1967), was flagrantly violated by the deliberate deception of the Government. The Government deliberately withheld from the processes of that hearing the disclosure of overhearings of attorneys for the petitioners. The exercise of this Court's supervisory powers to ensure proper compliance with its orders alone would dictate the grant of this petition.

In addition, there is raised the significant novel question of whether such interceptions of trial counsel and their investigators violate the defendants' constitutional rights to due process and effective assistance of counsel. Thus far the disclosures of illegality made by the Government in this case have been made reluctantly and in an attempt to conceal from the Courts and the defense the full extent of its unlawful activities. As a result of the scope of its self-imposed catharsis announced in its Supplemental Memorandum in *Schipani* v. *United States,* No. 504, O.T. 1966, the Government has felt impelled to reveal only those overheard conversations *of a defendant* which it deemed "arguably relevant" to the prosecution. See, Brief for the United States in Opposition, pp. 10-11, *Hoffa* v. *United*

States, No. 546, O.T. 1968. This Court, however, in *Kolod* v. *United States,* 390 U.S. 136 (1968), presently pending on petition for rehearing, held that the Government cannot decide *ex parte* whether or not the overhearing may have affected a defendant's case.

Perhaps nowhere is the Government's attempt to conceal the true extent of its eavesdropping activities more strikingly illustrated than in this very case. During the trial below, numerous defense requests for the production of illegally overheard conversations were denied (H.D.A. 490-492). At no time during the trial did the Government admit that it had conducted any eavesdropping whatever, or that it then had in its possession any records of such overheard conversations. Not until the cause was pending in this Court on petition for a writ of certiorari, did the Government reveal that it had overheard one conversation of *one* of the defendants. *Hoffa* v. *United States,* 387 U.S. 231 (1967). After remand of the case by this Court to the District Court, the Government confessed that the overheard conversation disclosed to this Court was not the only intercepted defendant's conversation in its possession, but that indeed it had *nine* other overhearing of "some of the defendants". 273 F. Supp. 141, 143 (1967). These conversations were not furnished to the defense (H.D.A. 855-864, 865), but were examined by the Court *in camera,* and found by it not to be relevant to the transactions and evidence on which petitioners were convicted (H.D.A. 864).

Even the disclosure of these additional nine overhearings was not the final chapter of the Government's policy of deception seeking to conceal the extent of its eavesdropping activities. At the hearing on remand the Government made no representation as to whether it had eavesdropped on defense counsel, agents, or employees and took the position that it was required to disclose only those conversations in which a defendant participated. Despite the explicit

direction of this Court's mandate, the District Court thereupon limited the inquiry to eavesdropped conversations of defendants only (H.D.A. 857-8), and prevented the introduction of any evidence relating to electronic surveillance on defense counsel or defense investigators (H.D.A. 1071, 1437, 635, 642-3, 857-8, 1513). See this Court's expression of disdain for such unduly restrictive interpretations of such orders, *Remmer* v. *United States*, 350 U.S. 377, 382. Yet nine months later, during the oral argument of this cause in the Court of Appeals, in response to an inquiry from the Court, Government counsel disclosed for the first time that the Government had in its possession records of an undisclosed number of overhearings of defense counsel. To this day, these overhearings have not been disclosed to petitioners, nor has the identity of overheard counsel, nor the time, place or participants in such intercepted conversations.[22]

Surely, the foregoing conduct of the Government represents a studied and considered practice of deception to conceal from the Courts and the defense the extent of its illegality. As so aptly stated by the dissenting opinion of the Court of Appeals, the manner of these disclosures was a "narrow and cavalier response to the Supreme Court's broad direction" (App. F., *infra*, p. 117). Nothing in this Court's mandate in this case, or in the decisions in *Black* v. *United States*, 385 U.S. 26, *Schipani* v. *United States*, 385 U.S. 372, or *O'Brien* v. *United States*, 386 U.S. 345, warrants as much as an inference that freedom from illegal governmental eavesdropping is limited to conversations of the accused alone. Certainly, defendants' right to the effective assistance of counsel under the Sixth Amendment and to due process of law under the Fifth Amendment is

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[22] On October 24, 1968, the Solicitor General admitted, in a Supplemental Memorandum for the United States in *Gorman* v. *United States*, No. 173, O.T. 1968, an unlawful electronic surveillance of the attorney for petitioner Burris.

violated if his attorney's conversations may be intruded upon by the Government with immunity. The integrity of the conversations of his defense investigators, if they be material to the case, should similarly be subject to the same constitutional protection. Here, a conversation between defense investigator O'Brien and counsel for petitioner Hoffa was illegally overheard by the Government during the pendency of the indictment below. *O'Brien* v. *United States*, 386 U.S. 345 (1967). Yet, at the hearing on remand the Government adamantly refused to produce the logs of such conversation, and the District Court denied the numerous defense requests therefor (H.D.A: 630-9, 961-4, 1290, 1368, 1447-8). We submit that the doctrine which impelled this Court's reversal of convictions in *Black*, *Schipani*, and *O'Brien*, *supra*, is rationally applicable to pertinent conversations of defense counsel and investigators.

This cause thus presents an appropriate avenue for the establishment of standards for ascertaining the extent of the Government's illegal activity. The impelling need for the establishment of such standards and this Court's exercise of its supervisory powers in this all-important area warrants the grant of certiorari here.

VII.

Rule 27, Fed.R.Crim.P., Violates the Confrontation Clause of the Sixth Amendment.

Upon remand by this Court to the District Court for evidentiary hearing, the District Court indicated that the burden on the prosecution was to establish that it was aware of the contents of the intercepted conversation prior to the overhearing and that there were "no other electronic trespasses which aided in the conviction in this case." (H.D.A. 797). In an attempt to sustain that bur-

den, the prosecution offered into evidence the affidavits of Charles Bolz and Leon Green (H.D.A. 118, 119). The affidavit of Bolz asserted that he was the Section Chief of the Accounting and Fraud Section of the F.B.I. and that the F.B.I. had caused a diligent search of its records to determine the existence of the overhearing of any conversation participated in by any of the defendants and that such search discovered only the conversation admitted to this Court and the nine other additionally admitted overhearings which were submitted in a sealed envelope. Green's affidavit stated that he was the Deputy Assistant Commissioner of the Internal Revenue Service, that such Service had also caused a search of its records for the purpose of learning of the existence of such eavesdropped conversations, and that no such conversations were discovered. Neither Bolz nor Green was produced as a witness at the hearing. The District Court received such affidavits in evidence (H.D.A. 864), over the objection of the defense (H.D.A. 848-49, 853, 858-64).

The defendants urged that the use of affidavits denied them due process (H.D.A. 860, 864); that the affiants were not subject to cross-examination (H.D.A. 860, 864); that the affidavits were inadequate on their face for the affiants did not describe their duties; that they were based on hearsay; that they made no reference to searches for intercepted conversations of any one but defendants; and, that they did not state the extent or kind of documents examined by affiants (H.D.A. 855-56).

The Court of Appeals held that no prejudicial error was committed in receiving into evidence these affidavits and relied upon Rule 27; Federal Rules, Criminal Procedure. (App. F, *infra*, p. 96). Rule 27 states: "An official record or entry therein or the lack of such record or entry may be proved in the same manner as in civil actions." It thereby incorporates by reference Rule 44 of the Federal Rules of Civil Procedure, 28 U.S.C., thus per-

mitting proof of lack of record through the use of an authenticated written statement (Rule 44(d) Fed. R. Civ. P.).[23]

It would appear that the application of the interaction between Rule 27, Fed. R. Crim. P. and Rule 44, Fed. R. Civ. P., effectively act to eliminate a defendant's personal confrontation by and cross-examination of the witness in which he has an opportunity of testing the statements and deeds to which the witness has testified and by which the government has offered evidence in support of their case. "The primary object of the [confrontation clause of the Sixth Amendment] * * * was to prevent depositions or *ex parte* affidavits * * * being used against the prisoner in lieu of a personal examination and cross-examination of the witness * * *" *Mattox* v. *United States,* 156 U.S. 237, 242-243; *Barber* v. *Page,* 390 U.S. 719. It is clear that the Sixth Amendment right of confrontation includes the right of cross-examination, *Pointer* v. *Texas,* 380 U.S. 400, and that the denial of the right of cross-examination is a denial of due process of law. *In re Oliver,* 333 U.S. 257. As was recently stated by this Court "There are few subjects, perhaps, upon which this Court and other Courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement of the kind of fair trial which is this country's constitutional goal". *Pointer* v. *Texas,* 380 U.S. 400, 405. See also, *Douglas* v. *Alabama,* 380 U.S. 415; *Alford* v. *United States,* 282 U.S. 687.

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[23] Rule 44 permitting proof of the lack of an official record requires attestation thereto "by the officer having the legal custody of the record, or by his deputy, and accompanied by a certificate that such officer has the custody." Neither requirement was satisfied by either affidavit here in question. Objection to this infirmity was raised by the defense (H.D.A. 859).

In commenting on these rights, this Court stated in *Green* v. *McElroy*, 360 U.S. 474, 496-97: "They have ancient roots. They find expression in the Sixth Amendment which provides that in all criminal cases the accused shall enjoy the right 'to be confronted with the witnesses against him'. This Court has been zealous to protect these rights from erosion." See also *Barber* v. *Page*, 390 U.S. 719.

Through the device of the interaction of Rule 44, Fed. R. Civ. P. and Rule 27, Fed. R. Crim. P., the defendants were effectively deprived of the right to confrontation and cross-examination of significant witnesses on a substantial issue pertaining to the question presented by this Court's remand as to whether the illegal interception tainted the convictions of the defendants. To permit this proof to stand on the basis of affidavits would equally permit similar presentation of proof in any stage of the criminal trial, thereby violating the Sixth Amendment rights of persons accused of crime.

There is an apparent conflict between Rule 27, Federal Rules of Criminal Procedure, and the right granted by the Sixth Amendment. This Court should undertake to resolve the apparent differences between the Rule and the Constitution so that whatever import that Rule may have can be clearly delineated within the framework of the Constitution of the United States. For the foregoing reasons, the petition for writ of certiorari should be granted.

Petitioners submit that the foregoing reasons pertaining to the issues arising from the Government's unlawful eavesdropping and the hearing on remand amply illustrate the conduct and tactics of the Government in flouting the basic and constitutional rights of petitioners to due process of law and a fair trial. As stated so aptly by Judge Swygert in the Court of Appeals, ". . . the Government's

narrow and cavalier response to the Supreme Court's broad direction ought not to be condoned." (App. F. *infra*, p. 117). The Government's consistent pattern of deception in an effort to conceal the extent of its eavesdropping activities from the Courts and from petitioners is totally inconsistent with a policy of law enforcement geared to insuring that Constitutional protections are respected.

Indeed, so contemptuous and oblivious has the Government been of the rights of an accused in this regard, that in another case involving petitioner Hoffa, the Government, despite numerous and repeated defense requests, waited until said petitioner had been incarcerated for over nineteen months before revealing to this Court for the first time that it had in its possession illegally obtained records of conversations of the defendants therein (*Hoffa* v. *United States*, *No.* 546, O.T. 1968). Surely, this Court should not condone such nefarious conduct, but should in the exercise of its supervisory powers, and as a deterrent to the continuation of such contemptible strategems, grant certiorari and set aside the judgments of conviction.

We now proceed to discuss those reasons urged for granting the writ, which pertain to the issues arising at trial.

VIII.

Communications From Trial Judge To Deliberating Jury In Absence Of Defendants And Their Counsel.

The Court of Appeals held that although "it was not good practice for the trial judge to have sent the brief message and indictment to the jury in the absence of defendants and their counsel, . . . [u]nder the circumstances then present . . . the procedure now complained of was not prejudicial and does not warrant a reversal of defendants' convictions." (App. A, *infra*, p. 28). Thus, the Court be-

low seemingly acknowledges that petitioners' Fifth Amendment and Sixth Amendment rights to counsel and petitioners' right to be present at trial (Rule 43, Fed. R. Crim. P.) were violated, but that no prejudice was shown. However, the dissent thought the trial judge's action was "plain error", doubted the need to show prejudice for reversal "since the error committed was of constitutional proportions", and found that the record did not negative, but affirmatively showed a reasonable possibility of prejudice to petitioners' necessitating reversal (App. A, *infra*, pp. 44-46).

This Court in *Grosso* v. *United States*, 390 U.S. 62, issued a writ of certiorari to the Third Circuit Court of Appeals (385 F. 2d 154) to review an almost identical question.[24] This Court reversed the convictions on other grounds thus making it unnecessary to decide this particular issue. 88 S.Ct. 709, 715. We urge that certiorari be granted so that this Court may again have the opportunity of deciding whether and under what circumstances such conduct by a trial judge after submission of a case to the jury prevented a fair trial.

A. The decision of the Court of Appeals is in conflict with *Shields* v. *United States*, 273 U.S. 583. There the Court, with no requirement as to prejudice, reversed a federal criminal conviction because the trial judge violated the right of defendant and counsel to be present when the trial judge answered inquiries from a jury. The decision below is in further conflict with the decisions of the Third Circuit Court of Appeals in *Arrington* v. *Robertson*, 114

[24] The question presented in Grosso was: "Can criminal convictions stand where there were communications between the Court and the jury during the jury deliberations in the absence of petitioners and their counsel, and there has been no showing that these communications were not prejudicial to the petitioners."

F. 2d 821, and *United States* v. *Neal,* 320 F. 2d 533; the Sixth Circuit Court of Appeals in *Evans* v. *United States,* 284 F.2d 393; and the Tenth Circuit Court of Appeals in *Fina* v. *United States,* 46 F.2d 643. These decisions reversed trial courts for their answering of inquiries from the jury in the absence of the defendant and his counsel, or in the absence of defendant alone with no requirement as to showing of prejudice. This is in line with our reading of *Shields* and the usual rule that no prejudice need be shown for reversal because of the violation of a constitutional right. *Gideon* v. *Wainwright,* 372 U.S. 335; *Chapman* v. *California,* 386 U.S. 18, 23. See also, *Wheaton* v. *United States,* 8 Cir., 133 F. 2d 522, 527; *Outlaw* v. *United States,* 5 Cir., 81 F. 2d 805, 808, 809; *Walker* v. *United States,* D.C. Cir., 322 F. 2d 434, 438 (dissenting opinion of Edgerton, J.), and the dissenting opinion of Judge Swygert in this case (App. A, *infra,* p. 45); and compare *United States* v. *Behrens,* 375 U.S. 162 (without requirement as to prejudice, conviction reversed because defendant and his counsel were not present at final sentencing); *Snyder* v. *Massachusetts,* 291 U.S. 97, 136 (dissenting opinion: no need of prejudice for due process reversal of conviction because defendant was not permitted to be present at the jury's viewing of the scene of the crime, although his counsel was present); and *Levine* v. *United States,* 362 U.S. 610, 620 (dissenting opinion: no need of prejudice for reversal when a Sixth Amendment right to public trial is violated).

Subsequent to the time of the Court of Appeals' decision, this Court in analogous situations, has set aside convictions where counsel was not present at some critical stage of a proceeding. See, *Mempa* v. *Rhay,* 389 U.S. 128 (revocation of probation or deferred sentencing proceeding); *United States* v. *Wade,* 388 U.S. 218; *Gilbert* v. *California,* 388 U.S. 263 (pre-trial line-up); *Miranda* v. *Arizona,* 384 U.S. 436 (in-custody interrogation). Surely,

the absence of both defendant and his counsel at the critical moment of jury-judge communications during jury deliberations is a greater constitutional infringement than the constitutional impairment in the right to counsel cases, and requires reversal, even without a showing of prejudice.

B. The decision of the Court of Appeals is in conflict with the decisions of the Eighth Circuit Court of Appeals in *Rice* v. *United States,* 356 F. 2d 709, and *Osborne* v. *United States,* 351 F. 2d 111; and Ninth Circuit Court of Appeals in *Ah Fook Chang* v. *United States,* 91 F. 2d 805; and the Tenth Circuit Court of Appeals in *Little* v. *United States,* 73 F. 2d 861. These cases reversed convictions because of trial judge-jury communications in the absence of the defendant and his counsel. All of these cases explicitly applied the rule that reversal is required unless the record affirmatively shows no prejudice.[26] In this case, the Court of Appeals placed upon petitioners the burden of affirmatively showing prejudice; for, very plainly, the record here does not affirmatively negate prejudice.

Moreover, *Chapman* v. *California,* 386 U.S. 18, 23 decided after the Court of Appeals' decision in this case teaches "that before a federal constitutional error can be

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[25] Explicit application of the same rule to trial judge-jury communication in the absence of defendant and his counsel resulted in affirmance of conviction in *Jones* v. *United States,* 10 Cir., 299 F. 2d 661, cert. den. 371 U.S. 864; *Ray* v. *United States,* 8 Cir., 114 F. 2d 508, cert. den. 311 U.S. 709; *United States* v. *Compagna,* 2 Cir., 146 F. 2d 524, cert. den. 324 U.S. 867; *Dodge* v. *United States,* 2 Cir. 258 Fed. 300, cert. den. 250 U.S. 600; *Estes* v. *United States,* 5 Cir., 335 F. 2d 609, cert. den., 379 U.S. 964; *Walker* v. *United States, D.C. Cir.,* 322 F. 2d 434; *United States* v. *Agueci,* 2 Cir., 310 F. 2d 817; *United States ex rel. Shapiro* v. *Jackson,* 2 Cir., 263 F. 2d 282; *Outlaw* v. *United States,* 5 Cir., 81 F. 2d 805; *Peppers* v. *United States,* 6 Cir., 37 F. 2d 346; *Chambers* v. *United States,* 8 Cir., 237 Fed. 513.

held harmless, the Court must be able to declare a belief that it was harmless beyond a reasonable doubt." Id. at 24. Here, the Court of Appeals clearly did not apply the *Chapman* test and therefore the decision below is in direct conflict with a recent decision of this Court.

Had petitioners been afforded the opportunity, they might have persuaded the trial judge to adhere to his prior position (Tr. 15239; D.A. 2172, 2176) of not letting the jury have the indictment. Failing that, the petitioners might well have persuaded the trial judge to expurgate the copy of the indictment sent to he jury by elimination of: (1) an allegation of adverse breach of trust (see p. 32, *infra*), theretofore kept from the jury because of considerations of fairness readily agreed to by the trial judge and the Government (Tr. 15294; D.A. 44, 2112-2148); (2) the adverse content of the seven counts not submitted to the jury; and (3) all markings.

Had petitioners been afforded the opportunity, they almost certainly would have been able to persuade the trial judge, with or without the Government's acquiescence, to call the jury into open court, ascertain the nature of their confusion, and instruct them accordingly—after due consideration of suggestions, amendments, and additions offered by petitioners. Instead, with no opportunity for objection, the trial judge cut off all inquiry by the jury with his message that the jury was going to get nothing except the indictment. Yet, the message from the jury with its references to working papers and documents of law, counts, and overt acts indicated that the jury wanted some instruction on something, although just what remains a mystery. The majority opinion regarded the request as "ambiguous as to what specific information the jury desired" (App. A, 24). Hence, for aught that appears

in the record, the jury's verdicts of guilty were influenced by the jury's uncorrected and adverse misconception of some major issue of law or fact or both.[26]

C. In sum, the affirmance of petitioners' convictions on a record which does not negate prejudice contravenes: (1) the rule of *Shields* v. *United States,* 273 U.S. 583, and the other authorities cited in sub-point A, *supra,* which conclusively presume prejudice in a Sixth Amendment violation by trial judge-jury communication in the absence of defendant and his counsel; (2) the rule of this Court and some circuits which, in such circumstances, requires reversal unless the record clearly negates prejudice; and (3) the rule of reversal, unless the record clearly negates prejudice, frequently applied by this Court, not to violations of the Constitution, but to lesser trial errors of non-constitutional proportions.[27]

It is apparent from the decision cited in sub-points A and B, *supra,* that many Federal trial judges continue to disregard the Sixth Amendment right[28] of a defendant to be present with counsel at all stages of his trial, including responses to jury inquiries. And it is further apparent

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[26] See *Bollenbach* v. *United States,* 326 U.S. 607, 612-613; *United States* v. *Jackson,* 3 Cir., 257 F. 2d 41, 43; *United States* v. *Noble,* 3 Cir., 155 F. 2d 315. 318; *Gomila* v. *United States,* 5 Cir., 146 F. 2d 372, 373.

[27] The application of such rule to trial errors of non-constitutional proportions is exemplified by *Bihn* v. *United States,* 328 U.S. 633; *McCandless* v. *United States,* 298 U.S. 342; *Williams* v. *Great Southern Lumber Company,* 277 U.S. 19, *United States* v. *River Rouge Imp. Co.,* 269 U.S. 411; and *Yazoo & Mississippi Valley R. Co.* v. *Mullins,* 249 U.S. 531.

[28] See *Diaz* v. *United States,* 223 U.S. 442, 444; *Ponzi* v. *Fessenden,* 258 U.S. 254, 260; *Jones* v. *United States,* 10 Cir., 299 F. 2d 661, 662, cert. den. 371 U.S. 864; *Fina* v. *United States,* 10 Cir., 46 F. 2d 643, 644; cf. *Arrington* v. *Robertson,* 3 Cir., 114 F. 2d 821; *United States* v. *Douglas,* 7 Cir., 155 F. 2d 894.

that the various Courts of Appeals differ as to the rule of prejudice applicable to such widespread and ever-recurring trial errors in violation of constitutional rights. Authoritative clarification as to the rule concerning prejudice is needed. Finally, this Court's review in exercise of its supervisory powers is needed to secure better trial judge compliance with the Sixth Amendment.

IX.

Jury Instruction That One Using A Position Of Trust To Obtain Benefits Is Performing An Active Fraud.

There appears to be no dispute[29] that in order to prove a scheme to defraud under the mail fraud statute, there must be proof of a scheme embracing active or actual fraud. A charge of using the mails to carry out a scheme to defraud cannot be maintained on proof of mere constructive fraud, that is, nothing more than the receipt and retention of unwarranted benefits. But because a breach of trust may be an active fraud punishable under the criminal statute, or may likewise be a constructive fraud, that does not make the terms interchangeable. *Epstein* v. *United States,* 6 Cir., 174 F. 2d 754, 766.

Nevertheless, the Court of Appeals approved an instruction to the jury which equated "breach of trust" with "active fraud", though in so doing, it converted all constructive frauds into active punishable frauds:

> "One using a fiduciary position, a position of trust, to obtain benefits is not only performing a breach of trust but is performing an active[30] fraud." (D.A. 2141).

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[29] Br. in Opp. p. 56.

[30] The transcript indicates "act of" (Tr. 16, 505), although the difference is probably unimportant.

Consequently, even if the jury merely found that a "fiduciary" benefits by a good faith breach of his trust, they were obliged *ipso facto* to find an offense to have been thereby committed. In this fraud case, conviction required proof that petitioners devised a scheme and conspiracy to defraud the Pension Fund. The instruction, however, allowed guilt on the singular breach of a civil fiduciary duty only.

Intent to defraud is generally not only an essential element of fraud, but as here, the crucial issue. *United States* v. *Shavin*, 7 Cir., 287 F. 2d 647, 652; *United States* v. *Brandt*, 2 Cir., 196 F. 2d 653; *Miller* v. *United States*, 10 Cir., 120 F. 2d 968, 970. When an instruction dilutes intent to less than a knowing purpose and design to defraud, the result is reversible error. *West* v. *United States*, 10 Cir., 68 F. 2d 96, 98; *Frank* v. *United States*, 10 Cir., 220 F. 2d 559, 564. When coupled with the Court's failure to define "fiduciary"[31] and the fact that the jury had been given the indictment containing an undeleted, but previously excluded reference by a quasi-judicial entity to petitioner Hoffa's "breach of his fiduciary duties", the entire charge to the jury on the issue became, at best, equivocal. As this Court stated in *Bollenbach* v. *United States*, 326 U.S. 607, 612, "A conviction ought not to rest on an equivocal direction to the jury on a basic issue," and again at p. 690, "If it is a specific ruling on a vital issue and misleading, the error is not cured by a prior unexceptionable and unilluminating abstract charge." Conviction founded on this erroneous instruction should not stand and the petition for the writ should be granted.

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[31] Evidence showed that various petitioners had economic relations with each other, or with others, which the jury could have understood to be fiduciary relations. C.f., *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80, 85.

X.

Failure of Cautionary Instruction To Remove Prejudice Ensuing From Incriminatory Admissions of Co-defendants.

The trial of petitioners gives rise to a substantial novel question interpreting this Court's holding in *Bruton* v. *United States,* 391 U.S. 123, that a criminal conviction cannot stand where the admission of a co-defendant implicated the defendant, at a joint trial, even though accompanied by a cautionary instruction. Here, co-defendant Benjamin Dranow testified on his own behalf. The Government sought to impeach that testimony through the use of certain letters written by Dranow which indicated that he was demanding a payoff from his several co-defendants for accepting criminal blame. These letters were made available by Irving Link, who had testified in the Government's case-in-chief. Link was later recalled as a rebuttal witness for the purpose of establishing the background of the letters.

Over objection by petitioners, the district judge instructed the jury to consider the Link letters only as to Dranow. Subsequently, the judge refused to admit the letters into evidence. He referred to their prejudicial nature and later gave a cautionary instruction to the jury to disregard both the testimony of Dranow and Link "in regard to those letters, and do not take that into consideration in any way in arriving at your verdict".

The majority below held that together with the cautionary instructions given the jury "There was no error as the letters were admissible to impeach Dranow." The dissent, in a remarkable anticipation of the *Bruton* holding said, "The crucial question is whether the disclosure of the contents of the letters was so prejudicial to the other defendants that the prejudice could not be cured by the

final exclusion of the letters from evidence. . . . The dissent held that "The letters were inherently prejudicial to all defendants." (App. A, *infra*, pp. 40-41).

Following the eavesdrop hearing, petitioners urged the *Bruton* principle in the Seventh Circuit with respect to the Link letters and certain extra-judicial testimony of petitioner Burris admitted at trial. The Court held that the Burris statements not to be incriminating with respect to the indictment in this case or as to any co-defendant, but failed to apply the harmless error rule of *Chapman* v. *California*, 386 U.S. 18, applicable in all constitutional errors (App. F, *infra*, p. 102). See, *United States ex rel. Johnson* v. *Yeager*, 3 Cir., 399 F. 2d 508. As to the Link letters, the Seventh Circuit found that *Bruton* did not alter its prior decision on the point and that opportunity to cross-examine Dranow was afforded petitioners (App. F, *infra*, p. 103).

Clearly, the Link letters were so inflammatory and prejudicial to petitioners' rights to a fair trial that the District Court, and by implication the Court of Appeals, concluded that such letters and the accompanying testimony thereto should have been excluded from the jury's consideration. The Court of Appeals effectively held, in spite of *Bruton*, that a cautionary instruction sufficed to protect petitioners.[32]

While this Court has stated that not every admission of inadmissible evidence can be considered to be reversible error unavoidable through limiting instructions, it seems clear that that caveat applies more appropriately to those "instances [which] occur in almost every trial where in-

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[32] In its opposition to the prior petition for certiorari, *Hoffa* v. *United States*, No. 1003, O.T. 1966, the Government specifically relied on the now overruled holding in *Delli Paoli* v. *United States*, 352 U.S. 232, to support the lack of prejudice to petitioners.

admissible evidence creeps in, usually inadvertently". *Bruton* v. *United States,* 391 U.S. 123. Here, Judge Swygert held "there can be little doubt that the prosecutor's efforts to impeach Dranow in this manner were in fact attempts to inject highly inflammatory material into the case prejudicial to all the defendants". (App. A, *infra,* p. 41).

This case raises a novel issue interpreting *Bruton's* recent revitalization of the philosophy of *Jackson* v. *Denno,* 378 U.S. 368, repudiating the adequacy of limiting instructions as a sufficient device for preserving a fair trial. See also, *Burgett* v. *Texas,* 389 U.S. 109; *United States* v. *Smith,* 6 Cir., 4 Cr. L. 2091. Here, the evidence was excluded as to all defendants because of its inflammatory nature. Here, the Government's motives for the introduction of the poisonous matter are seriously questioned. Here, the district court refused to allow the matter to stand even against Dranow after "weighing the damages against the benefits." (D.A. 2064).

However, the Seventh Circuit's decision here, holding *Bruton* inapplicable because Dranow testified and was available for cross-examination[33] is contrary to its own opinion in *United States* v. *Guajardo-Melendez,* 401 F. 2d 35, decided less than a week before this case.[34] *Cf., Barber* v. *Page,* 390 U.S. 719, where a witness was not cross-examined though opportunity was afforded at preliminary

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[33] The petitioners have consistently contended that Dranow's obvious incompetence required a severance from him. The effective ability to cross-examine him was totally obviated by his irrationality and the serious question of his ability to intelligently answer questions which was inherent in his obvious lack of rational competence.

[34] The Ninth Circuit had declined to follow *Guajardo-Melendez* in *Santoro* v. *United States,* 9 Cir., 4 Cr.L.Rep. 2170.

hearing. See also, *United States* v. *Bujese,* 392 U.S. 297, where a co-defendant testified and was cross-examined but this Court reversed in light of *Bruton.*

While this Court has by its *Bruton* decision, strongly undercut the proponents of cautionary instructions as the panacea for obvious trial errors, this case requires an interpretation of the circumstances in which a cautionary instruction will suffice in a joint trial and therefore the writ should be granted.

XI.

Prejudicial Newspaper Articles Imparted To Sequestered Jury By Its Foreman And Prejudicial Statements By Some Jurors.

After the return of the verdict, alternate juror Pare' sought out counsel for petitioner Hoffa and submitted an affidavit attesting that a news article relating to the exclusion of the Link letters had been circulated by Foreman Gogerty (D.A. 310, 311, 2187) and that many prejudicial statements had been exchanged between the jurors. Though Pare' testified in detail to the foregoing (D.A. 305-314, 2181-2218), the trial court denied petitioners' motion for a new trial (D.A. 2212) and petitioner Hoffa's motion to reassemble the jury for the purpose of allowing inquiry concerning their awareness of the articles and their exchanges of expressions of hostility towards Hoffa during the trial and before deliberation (D.A. 2215).

The protection of petitioners' constitutional rights of fair trial, of confrontation, of cross-examination, of counsel and of trial by an impartial jury minimumly required the trial judge to ascertain which jurors had read the newspaper article, and what information they had obtained from it. The Government previously urged here that the newspaper article "did not acquaint the jury with anything which they did not know as a result of the trial." (Br. in

Opp., p. 45). This statement is simply untrue. Juror Gogerty, and any other juror seeing this article, learned therefrom: (1) That the judge had rejected two motions for judgment of acquittal; (2) That in so doing, the judge had rejected a contention of petitioner Hoffa's innocence and "good faith"; and (3) that the Link letters had in fact stated that Dranow "would take the blame" and had "asked for a $60.00 a day payoff from co-defendants".[35]

The article was headlined, "Hoffa Turned Down on 2d Acquittal Plea" (D.A. 311). "Acquittal" in general usage means, or strongly suggests, a finding of innocence. To laymen jurors in any criminal trial, a motion for a judgment of acquittal might well mean a request for a finding by the trial judge of innocence, and its rejection simply a finding of guilt by him. Doubtless, this is why such motions are heard and decided out of the jury's presence.

In addition, the article described the defense argument in support of the second motion for judgment of acquittal as one made "in contending [Hoffa's] innocence" and that such motion was based on a contention "that Hoffa's testimony on the stand . . . was sufficient proof that he acted in 'good faith' ". The Trial judge's rejection of an argument so characterized almost inevitably implies that the judge, himself, found petitioner Hoffa guilty, and that Hoffa's testimony was lacking in "good faith" on "the stand". Unquestionably, the Sixth Amendment would invalidate all verdicts of guilty influenced by such a jury understanding of the trial judge's two rulings against petitioner Hoffa, the central figure in the offenses charged, and a defense witness. See *Parker* v. *Gladden*, 385 U.S. 363,

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[35] The several petitioners mentioned by name in but one of the two Link-Dranow letters were not described in the letters as "codefendants." Three petitioners, including Hoffa, were not mentioned at all.

where only the bailiff, not the trial judge, said petitioner was guilty; and see *Henry* v. *United States,* 6 Cir., 204 F. 2d 817; *Briggs* v. *United States,* 6 Cir., 221 F. 2d 636. Yet here, there is the strong prejudice to all petitioners from any reading by the jury of the newspaper article's untested and uncross-examined assertion that petitioner Dranow "would take the blame" and asked "a $60.00 a day payoff from co-defendants".

The affirmance by the Court below of the trial judge's denial of inquiry in these circumstances runs counter to the whole course of settled decisions on the subject. We cite the cases in the margin.[36] In many of them, the potential prejudice to the defendant was fairly comparable to, or less than, the obvious prejudice to petitioners here. Constitutional rights without remedies are not of much use. Here, both courts below ignored and denied the well-established remedy for enforcement of petitioners' rights of fair trial. We ask the exercise of this Court's supervisory power in protection of those rights.

Furthermore, the decision below is in direct conflict with the recent decision by the Tenth Circuit Court of Appeals in *Mares* v. *United States,* 383 F. 2d 805. There, a newspaper article regarding the defendants' withdrawn guilty plea and oral confession and the out of context statements of the trial judge in excluding the same from evidence appeared during the trial. The hearing on the offer to

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[36] *Janko* v. *United States,* 366 U.S. 716; *Remmer* v. *United States,* 347 U.S. 227, 229-30; *Mattox* v. *United States,* 146 U.S. 140, 150-151; *United States* v. *Accardo,* 7 Cir., 298 F. 2d 133, 136; *Coppedge* v. *United States,* D.C. Cir., 272 F. 2d 504, 508; *Briggs* v. *United States,* 6 Cir., 221 F. 2d 636; *Wheaton* v. *United States,* 8 Cir., 133 F. 2d 522, 528; see *United States* v. *Gersh,* 2 Cir., 328 F. 2d 460, 464, cert. den. sub nom *Mugnola* v. *United States,* 377 U.S. 992; *Baker* v. *Hudspeth,* 10 Cir., 129 F. 2d 779, 782.

introduce the oral confession into evidence was not conducted in the presence of the jury. Although defense counsel moved for a mistrial, no request was made that the jury be examined as to whether any members had read it. Nevertheless, the Tenth Circuit held that the trial judge should have examined the jury, stating that the Court's failure to determine whether the jurors had been exposed to the prejudicial article required the granting of a new trial. Here, the trial court should have ascertained what jurors had read the prejudicial newspaper article and what effect it had upon their decision.

B. In another aspect, the denial in this case of new trial or inquiry of the jury presents important questions of the correct interpretation, and the breadth or narrowness of the applicability of this Court's decision in *Parker* v. *Gladden*, 385 U.S. 363, to the administration of justice in federal and state criminal proceedings. Here, it is a fact that some of the jurors, including juror Gogerty (later elected foreman) made numerous statements of petitioners' guilt to their fellow jurors. For detail on these statements see *supra*, pp. 38-40.

Such statements were made prior to the jury's deliberations on innocence or guilt. They clearly showed, at least, the premature partiality and bias of the jurors making them. *Parker* invalidated a conviction because of the bailiff's statement to some jurors of the guilt of the defendant,[37] a statement that was of decisive consequence

[37] In *Parker*, the bailiff also made a statement that the Supreme Court would correct anything wrong in finding the defendant guilty. An equivalent statement was made by a juror here. See Statement, *supra*, p. 39.

because of his expression of it to jurors was prejudicial to the defendant. The statements of guilt here by some jurors, besides showing their own adverse bias, were likewise calculated to prejudice other jurors against the defendants, petitioners here. As the Court noted in *Parker*, a bailiff in charge of a jury carries great weight with its members. So does a fellow juror, and, even more so, a fellow juror so pre-eminent amongst his fellows as to be elected foreman. Is *Parker* applicable to the prejudicial statements of jurors, or of a jury foreman, made before the jury's deliberations? And, more particularly, in light of *Parker* and Sixth Amendment rights to a verdict based on evidence at trial considered by impartial jurors, can verdicts of guilty stand, even though the adverse partiality of some jurors is manifest, and their fellow jurors are subject to the repeated impact of their statements of the guilt of the defendants?

XII.

Refusal Of Trial Judge To Grant Other Petitioners A Severance From Dranow And To Order Mental Examination.

The prejudice to these petitioners from having to stand trial with co-defendant Dranow was substantial. These petitioners were irreparably prejudiced by Dranow's self-destructive and self-incriminating testimony and conduct during the trial. Without burdening the Court with a repetition of this misconduct, we refer the Court to Statement of Facts, *supra*, pp. 40-43.

On numerous occasions before and during trial, petitioners moved for a mistrial or severance as a result of co-defendant Dranow's misconduct (D.A. 373, 396, 552; Tr. 923-4; 2252-3; 2258-60).

The dissenting opinion below stated that "During the trial Dranow made frequent outbursts and had many

verbal clashes with the judge, the attorneys, the marshals, and even spectators. As a witness, he was vulgar and boisterous" (App. A, *infra,* pp. 37-38).

We submit that when this prejudice to petitioners became apparent to the Court during the trial, the trial court should have granted a severance from co-defendant Dranow. The Court's refusal to grant the numerous requests for severance by reason of such irrational conduct of a co-defendant, resulting in obvious prejudice to petitioners, was a denial of petitioners' rights to a fair trial. *United States* v. *Kelley,* 2 Cir., 349 F. 2d 720, 758 cert. denied, 384 U.S. 947; *United States* v. *Haupt,* 7 Cir., 136 F. 2d 661, 673; *Ingram* v. *United States,* 4 Cir., 272 F. 2d 567; *Schaffer* v. *United States,* 362 U.S. 511, 516.

At a minimum, however, when the flagrant misconduct and irrationality of co-defendant Dranow became apparent to the Court, these petitioners were entitled to have the trial court conduct a hearing to determine the mental competency of their co-defendant. Under Section 4244, Title 18 U.S.C., such an examination to determine mental competency should be made upon the Court's own motion, where the circumstances warrant, irrespective of whether requests for the same are made by the defendant suspected of being mentally incompetent. It is the Court's ultimate duty to determine whether a defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him." *Dusky* v. *United States,* 362 U.S. 402. The Government, in its brief in opposition to petitioners' earlier petition for writ of certiorari (p. 59) argued that the Court was not required to order a mental examination of Dranow since Dranow's counsel did not submit any reports of Dranow's psychiatrists as to his

condition, and that this constituted an abandonment of the claim of mental incompetency. Assuming such to be the case, *these* petitioners ought not be prejudiced by failure of a co-defendant to submit such reports. The duty of the trial court under the circumstances here presented, remained clearly as provided in Section 4244, to order the mental examination.

This case, therefore, presents a unique opportunity for this Court to determine the rights of co-defendants to a fair trial, when they are compelled to stand trial jointly with a co-defendant whose mental competency is so graphically placed in issue.

XIII.

Accused's Effective Right To Testify On His Own Behalf Precluded By Impeachment Through The Use Of A Non-Final Conviction For A Subsequent, Unrelated, But Highly Prejudicial Offense.

A. The holding here of the Court of Appeals[38] that it is proper to impeach a defendant by a conviction which is still pending on appeal and not final is in conflict with the decision of the Court of Appeals for the District of Columbia Circuit in *Fenwick* v. *United States*, 252 F. 2d 124. In the latter case, the Court reversed Fenwick's conviction precisely because of such impeachment by a non-final conviction, and further held it to be immaterial that before its decision the impeachment conviction had become final.

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[38] The Government in its brief in opposition to petitioners' earlier petition for certiorari contended that petitioners' "failure to object to the question *in the presence of the jury* should foreclose their present claim" (Br. in Opp. 51). We contend that to force defense counsel to renew an objection that had already been denied would serve no valid purpose. See *Miller* v. *California*, ... U.S. ....., 20 L.Ed. 2d 1332, and cases cited at ..... U.S. ....., 20 L.Ed. 1336.

by reason of the same Court's affirmance. Additionally, here the impeaching conviction for jury-tampering is still under review by this Court.[39] (See *Hoffa, et al* v. *United States,* No. 546 O.T., 1968, wherein on October 21, 1968 the Government first revealed that it has in its possession records of an undisclosed number of conversations of defendants which were illegally monitored by the Government. Defendants' motions to set aside the judgments of convictions are presently pending in this Court).

The *Fenwick* decision in the District of Columbia Circuit followed two earlier decisions in the same circuit. See *Campbell* v. *United States,* 176 F. 2d 45 (Impeachment by a conviction on appeal held error); *Beasly* v. *United States,* 218 F. 2d 366, cert. den. 349 U.S. 907 (Impeachment by conviction on which sentence was not yet imposed held error).

The decision of the Court below followed its earlier decision in *United States* v. *Empire Packing Co.,* 174 F. 2d 16, cert. den. 337 U.S. 959 (In a non-jury case, impeachment by a conviction then on appeal held proper). And the result reached by the Court below finds some support in *Bloch* v. *United States,* 9 Cir., 226 F. 2d 185, cert. den. 350

[39] The disagreement between the holding of the Court below and the decisions of the Court of Appeals for the District of Columbia Circuit in *Fenwick,* and other cases cited in the text of this point on impeachment is further emphasized by another consideration. In the District of Columbia Circuit, unlike other federal jurisdictions, it is a statute of Congress which makes prior convictions generally admissible for purposes of impeachment; and therefore, even though the Court of Appeals for that Circuit has some doubt as to its power to find some types of prior convictions inadmissible, *Richards* v. *United States,* D.C. Cir., 192 F. 2d 602, 606, cert. den., 342 U.S. 946; *Brown* v. *United States,* D.C. Cir., 370 F. 2d 242, nevertheless, it has done so.

U.S. 948 (Prosecutor's asking defendant about a conviction then on appeal held not a showing of bad faith on prosecutor's part).[40]

The conflicts between the *Fenwick* and *Campbell* decisions in the District of Columbia Circuit and the Seventh Circuit's decision in this case and in *Empire Packing Co.* have been intimated by the Court below (App. A, *infra*, p. 29), and expressly noted by the trial judge in this proceeding (D.A. 367), the Court of Appeals for the District of Columbia Circuit,[41] the Court of Appeals for the Ninth Circuit,[42] and the Court of Appeals for the Second Circuit.[43]

The confusion in the circuits arising from the conflict between the rule applied in the District of Columbia Circuit and that applied in the Seventh Circuit is increased by the application in the Second Circuit of still a third rule which is different from both of them. In the District of Columbia Circuit, a non-final conviction cannot be used for impeachment, whatever may be the subsequent history of the conviction. In the Seventh Circuit, a non-final conviction can be used for impeachment, whatever may be the subsequent history of the conviction. But in the Second Circuit such use of a non-final conviction is not reversible error if the conviction later becomes final; and the question is open whether it be reversible error if the conviction is later invalidated. See *United States* v. *Cipullo*, 170 F. 2d 311, and *United States* v. *Owens*, 271 F. 2d 425.

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[40] However, *United States* v. *Levi*, 177 F. 2d 827, a decision of the Seventh Circuit, held it reversible error to impeach by a conviction then subject to a motion for judgment of acquittal.

[41] See *Fenwick* v. *United States*, 252 F. 2d 124, 126n.

[42] See *Bloch* v. *United States*, 226 F. 2d 185, 188, cert. den. 350 U.S. 948.

[43] See *United States* v. *Owens*, 271 F. 2d 425, 426.

Each of these three differing rules is well-embodied in its own Circuit by the authority of at least two decisions within each Circuit. The mere passage of time without this Court's intervention is not likely to effect reconciliation and the achievement of one rule consonant with constitutional rights and uniform for all federal circuits on this question which so strongly and so often affects the issue of acquittal or conviction.

In the development of our jurisprudence, judicial proceedings have been evolved for the testing of the validity of a conviction against pertinent provisions of the Bill of Rights. To permit impeachment by a conviction that was and still is under judicial scrutiny in such proceedings comports neither with the Constitution, nor with the law's providing for such proceedings to ensure protection of a citizen's constitutional rights.

B. Entirely apart from the problem of a non-final conviction, the decision of the Court below is in conflict with the decisions of the Court of Appeals for the District of Columbia Circuit in *Luck* v. *United States,* 348 F. 2d 763, and *Brown* v. *United States,* 370 F. 2d 242. The *Luck* and *Brown* cases require a trial judge in the District of Columbia to permit or prohibit impeachment only upon a search for the truth by considering all relevant factors, such as, for example, the need for the defendant's testimony, and the prejudice to defendant as against the relevance of the conviction to his credibility. But here the trial judge and the Court of Appeals, in the light of prior decisions in the Seventh Circuit, approved the impeachment of petitioner Hoffa upon an automatic rule of admissibility, regardless of prejudice and relevance to credibility or any other circumstance. See App. A, *infra*, p. 28; *United States* v. *Pinna,* 7 Cir., 229 F. 2d 216, 219; and *Rinella* v. *United States,* 7 Cir., 60 F. 2d 216, 218.

Permitting impeachment by prior conviction of a man on trial for his life or liberty gives him but a ruinous choice. He can testify in his own defense, and if so, he runs the risk that the jury, no matter how instructed, will deduce his guilt of the crime charged from the fact of his prior conviction.[44] Or he can decline to testify and if so, he runs the risk that the jury, no matter how instructed, will deduce his guilt of the charged crime from the fact of his silence. Neither choice is conducive to the ascertainment of the truth and the protection of the innocent.

This view was ably expressed by the then Dean of the Harvard Law School, the current Solicitor General, when he urged:

> "The man with a prior criminal record in this country is far more at the mercy of the authorities—police and judicial—than seems to me to be warranted. * * * if he is arrested and put on trial, he has two almost hopeless alternatives in many states. He can take the stand and deny his participation in the crime now charged. If he does this, his prior conviction can often be shown to impeach his testimony, in which case he is very likely to be convicted. Or he can refuse to take the stand, resting on his Con-

[44] Recent studies of juries by the University of Chicago have found that jurors have "an almost inability and/or unwillingness either to understand or follow the court's instruction on the use of defendant's prior criminal record for impeachment purposes. The jurors almost universally used defendant's record to conclude that he was a bad man and hence was more likely than not guilty of the crime for which he was then standing trial." 70 Yale L.J., 764-777. Other case studies have demonstrated that innocent defendants are often deterred from testifying in their own behalf because of the fear of impeachment by prior convictions, and that such impeachment has been a key factor in convicting innocent persons. 78 Harv. L. Rev. 426, 442; Borchard, *Convicting the Innocent* (1932) 121, 138, 162; 232, 365-66; Frank, *Not Guilty* (1957) 106-07.

> stitutional privilege, in which case he is also very likely to be convicted. Ought we not, even with persons who have once offended against society, undertake to develop procedures which will seek as far as possible to bring out the truth about the crime now charged, not some prior crime?"
> Griswold, *The Long View,* 51 Amer. Bar. J. 1017,1021.

When the prior conviction has no bearing on the substantive elements of the crime presently charged, the realization by an accused that his right to testify in his own behalf is subject to impeachment by a non-related, non-relevant conviction gives him a choice "between the rock and the whirlpool." See, *Garrity* v. *New Jersey,* 385 U.S. 493; *Spevak* v. *Klein,* 385 U.S. 511.[45] The unfairness inherent in this choice was compounded below where the impeaching conviction was obtained through a deliberate effort to manipulate prosecutions (see *infra,* p. 100) for the precise purpose of confronting petitioner Hoffa, if he were convicted,[46] with his conviction in a heinous crime.

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[45] Compare, *Marchetti* v. *United States,* 390 U.S. 39, *Grosso* v. *United States,* 390 U.S. 62 and cases following, where this Court's philosophy similarly decrying the choice of giving up Fifth Amendment rights in order to comply with a statute was underscored.

[46] Conjecture leads us to consider that a sequestered jury considering mail fraud charges would be more influenced by a conviction of a jury tampering charge, than would a jury considering jury tampering charges be influenced by conviction of a mail fraud charge.

If such impeachment is to be permitted at all,[47] the rule adopted by the District Court of Columbia Circuit is preferable to the rule of the court below. The District of Columbia rule, at least, seeks, in the light of all pertinent circumstances, to balance the remoteness or closeness of the prior conviction's relation to credibility against the great or small need for the defendant's testimony, and the great or small prejudice to him if impeachment be permitted.

Yet, neither rule is best adopted for the ascertainment of the truth and the protection of the innocent against verdicts of guilty. This case provides an appropriate occasion for the Court's first consideration of a rule on impeachment for the federal courts which would seem best in assuring the ascertainment of the truth and the protection of the innocent—the two paramount objectives of justice in criminal cases. Such a rule, as repeatedly suggested or recommended by the studies of legal scholars,[48]

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[47] The rule permitting such impeachment is a relic of the original common-law rule that persons who had been convicted of infamous crimes were incompetent to testify even in their own behalf. Both the original rule and its derivative are based on the assumption that the testimony of defendants having such prior convictions is less trustworthy than the testimony of other defendants. Ladd, *Credibility Tests—Current Trends*, 89 U. of Pa. L. Rev. 166, 174-76; 2 Wigmore, *Evidence* (3d 1940) §519, p. 608; *Clawans* v. *District Columbia*, D.C. Cir., 62 F. 2d 383, 384, aff., 300 U.S. 617. This assumption, it has been pointed out, has no basis in experience or reason, it is not so infallible as to warrant its application to any particular defendant. Ladd, *supra*, at 176-78; 2 Wigmore, *supra*, §519, p. 602, 70 Yale L. J. 764.

[48] See *Other Crimes Evidence At Trial: Of Balancing And Other Matters;* 70 Yale L. J. 764, 765-778 (1961); *Procedural Protections Of Criminal Defendants—A Re-evaluation Of The Privilege Against Self-Incrimination And The Rule Excluding Evidence Of Propensity To Commit Crime*, 78 Harv. L. Rev., 426, 442; McCormick, *Evidence* (1954) §43; Ladd, *Credibility Tests—Current Trends*, 89 U. of Pa. L. Rev. 166, 189.

would bar impeachment by conviction of a man on trial for his life or liberty and testifying in his own defense—at least where he has not put his own character in issue.

C. Finally, the Government's manipulation of indictments, trials, and charges so as to create the record of a conviction of a single defendant (Hoffa) of a subsequent offense for impeachment in use of the trial here of a prior offense (see Statement, *supra*, pp. 43-45) is the same as the governmental operation condemned as basically unfair, and therefore requiring reversal, in *Commonwealth* v. *McIntyre*, 417 Pa. 415, 208 A. 2d 257 (1965). The affirmance of petitioners' convictions in disregard of the Government's unfair and manipulative tactics which created "an atmosphere of prejudice against all defendants" (App. A, *infra*, p. 35) and helped the getting of those convictions and violated petitioners' rights to a speedy trial, calls for review by the Court in the exercise of its supervisory powers.

XIV.

The Removal Of A Juror Without Ascertaining Whether He Had Become Unable Or Disqualified To Perform His Duties.

Rule 24(c), Federal Rules of Criminal Procedure, provides:

> "Alternate jurors . . . shall replace jurors who, prior to the time the jury retires to consider its verdict, become *unable to or disqualified* to perform their duties." (Emphasis supplied)

The grounds for disqualification of jurors are set forth in 28 U.S.C. §1861: (1) felony conviction, (2) inability to read, write, speak and understand the English language, and (3) incapacity of the juror by reason of mental or physical infirmities to render efficient jury service. Obviously, the first and second grounds of statutory dis-

qualification do not apply here. Whether juror Lee was unable to or disqualified by "mental infirmities" to perform his duties because of the injury to and possible death of his mother could not rationally be determined without inquiry of him.

To permit this procedure to stand as an acceptable method of removing a juror, not only clearly obviates the controlling rule of procedure, but effects a new and dangerous power in the district court, to wit, the authority unilaterally and without measurable standards of restraint to cause the removal of a juror. Rule 24(c) should not be expanded without direct approval by this Court and, therefore, the writ should be granted to determine this issue.

XV.

Multiple Schemes and Conspiracies and Irrelevant Transactions Presented As One Single Scheme and Conspiracy to Defraud.

When this Court last reviewed the permissible scope of conspiracy prosecutions, it again warned that it would "view with disfavor attempts to broaden the already pervasive and wide-sweeping nets of conspiracy prosecutions." *Grunewald* v. *United States,* 353 U.S. 391, 404.[49] The present case, essentially a "hodgepodge" of disassociated lawful transactions, presents a singular opportunity for the Court to review and delineate the permissible limits of conspiracy prosecutions. If permitted to stand,

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[49] See also *Krulewitch* v. *United States,* 336 U.S. 440; *Kotteakos* v. *United States,* 328 U.S. 750; *Lutwak* v. *United States,* 344 U.S. 604; *Delli Paoli* v. *United States,* 352 U.S. 232; *Bollenbach* v. *United States,* 326 U.S. 607; *United States* v. *Bufalino,* 2 Cir., 285 F. 2d 408; *United States* v. *Wortman,* 7 Cir., 326 F. 2d 717.

it will "broaden" the "wide-sweeping nets" of conspiracy prosecutions in the following respects: A) By the device of alleging, purportedly as a single scheme and conspiracy, unrelated transactions in each of the 28 counts of the indictment, the Government has prosecuted multiple schemes and conspiracies and non-criminal conduct as a single scheme and conspiracy, all to the prejudice of petitioners in conflict with this Court's decision in *Kotteakos* v. *United States,* 328 U.S. 750; B) By the same device, the Government was permitted to introduce great amounts of evidence which was not material or relevant to the common object of the claimed scheme and conspiracy, in conflict with the decisions of this Court and the Circuit Courts of Appeals; C) The trial Court's instructions erroneously failed to inform the jury that a finding of a single conspiracy and scheme was necessary for conviction, all in conflict with *Kotteakos* v. *United States, supra,* and *United States* v. *Borelli,* 2 Cir., 336 F. 2d 376. We discuss each of these aspects in turn.

A. The decision below is in conflict with *Kotteakos* v. *United States, supra,* and a line of Courts of Appeals decisions based thereon,[50] which hold that it is a prejudicial misjoinder of defendants when the Government prosecutes multiple conspiracies and schemes, each of which does not involve all of the defendants, as one single scheme and conspiracy. All of the judges below agreed that the central purpose of the alleged conspiracy and scheme was to "bail out" Sun Valley. They also agreed that the alleged unlawful scheme and conspiracy was to defraud the Pension

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[50] *United States* v. *Goss,* 4 Cir., 329 F. 2d 180; *United States* v. *Russano,* 2 Cir., 257 F. 2d 712; *Rocha* v. *United States,* 9 Cir., 288 F. 2d 545; *Daily* v. *United States,* 9 Cir., 282 F. 2d 818; *Canella* v. *United States,* 9 Cir., 157 F. 2d 470.

Fund by submitting false and fraudulent representations and concealing material facts to obtain loans.[51] Thus it is apparent, as the dissent emphasizes, that unless the evidence concerning a particular loan tended to prove both these ultimate facts, such evidence either established a separate scheme and conspiracy or was wholly irrelevant. (App. A, *infra*, p. 52).

The Government does not deny, and indeed, a close reading of its Brief in opposition filed earlier in this Court (Br. in opp. 36-37) confirms, that the Government introduced evidence on many Pension Fund loans without any attempt to fulfill the two requisites of the single scheme and conspiracy charged, to wit, fraud on the Pension Fund and use of loan proceeds for the Sun Valley reorganization. Thus, the Government erroneously contends and the Court of Appeals erroneously finds that the Government could properly prove at trial the "relationships among the parties" and introduce evidence pertaining to loans "which did not demonstrably assist the Sun Valley enterprises." (Br. in opp. 37).

As the dissent points out, there was no evidence that the Miracle Plaza, Miami International Airport Hotel, Birmingham Airport Motel, Club 300, Causeway Inn, the first and third First Berkeley and the fourth Fontainebleau loans had any relationship either to defrauding the Fund or to the common object of the alleged conspiracy and scheme, namely, the rehabilitation of Sun Valley, Inc. In addition, as the dissent notes, no relation was shown to the rehabilitation of Sun Valley in the following loans: 4306 Duncan Corp., third Fontainebleau, Good Samaritan

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[51] These two requirements go to all counts, substantive as well as conspiracy, for all counts alleged the same scheme and conspiracy. (See App. A, *infra*, p. 49).

Hospital, Casa Marina and La Concha, second Key West, second Everglades and the second First Berkeley loans.

Further, as the dissent observes, there was no misrepresentation to, or fraud on, the Fund in the first Everglades, the first Fontainebleau and the first Key West loans.

The 4306 Duncan Corp. loan was completely foreign to any possible concept of a conspiracy among the defendants. There was no claim that any of the defendants profited from the loan. It was solely for the benefit of Trustee Strecker, who was not shown to have any connection with or interest in Sun Valley or any of the other loans proved.

Moreover, as the dissent further notes, there was no evidence that petitioners Strate, Hyman and Kovens had any interest in the success of the claimed common purpose of the conspiracy—the rehabilitation of Sun Valley. Their interests in their loans were for their personal benefit. Cf. *Rocha* v. *United States,* 9 Cir., 288 F. 2d 545; *Canella* v. *United States,* 9 Cir., 157 F. 2d 470. If, taken in the view most favorable to the Government, misrepresentations were made, the loans in which Strate, Hyman and Kovens were respectively interested constituted, if illegal, separate schemes and conspiracies, and were not, in any event, part of the single scheme and conspiracy charged.

The above summary demonstrates that the many loan transactions alleged and proved were not "part of the same series of acts or transactions constituting an offense or offenses" as required by Rule 8(b) for the joinder of defendants.

The claimed cohesive force—common object of the conspiracy and scheme—was the rehabilitation of Sun Valley. Yet, as noted, a majority of the loans had no relation at all to that object, and there was no showing that the many

loans alleged constituted a "series of acts or transactions" necessary for the joinder of all of the defendants in each count of the indictment.

B. As we have pointed out and as admitted by the Government (Br. in Opp. 37), there was no evidence that many of the loans which were proved had any relation either to defrauding the Pension Fund or to the common object of the alleged conspiracy, the rehabilitation of Sun Valley. The evidence with respect to them, as the dissent holds, was wholly irrelevant and immaterial to the unlawful conspiracy charged, and the approval of its admission was therefor in conflict with the Seventh Circuit's own decision in *United States* v. *Wortman,* 326 F.2d 717; and with *United States* v. *Crimmins,* 2 Cir., 123 F.2d 271; *United States* v. *Peoni,* 2 Cir., 100 F. 2d 401. Cf. *Krulewitch* v. *United States,* 336 U.S. 440; *Grunewald* v. *United States,* 353 U.S. 391; *Forman* v. *United States,* 361 U.S. 416; *Fiswick* v. *United States,* 329 U.S. 211, 217.

The crime of conspiracy is limited by the scope of the mutual agreement among the conspirators. When the Government attempts to prove a conspiracy by circumstantial evidence, the extent and limit of the common agreement, as in any circumstantial evidence case, must reasonably flow from the circumstances proved. The Government may not set the scope of the common agreement simply by allegations. *Kotteakos* v. *United States,* supra; *United States* v. *Wortman, supra.* The Government's own proof here established that the claimed agreement was limited both by the rehabilitation of Sun Valley and by defrauding the Pension Fund by misrepresentations to obtain loans.

Nevertheless, the Government threw together, and was permitted to prove, all transactions touching any of the defendants which might present the defendants in a bad light to the jury. *United States* v. *Wortman, supra.* The prosecution was not based on "definite proof of specific crime." *United States* v. *Bufalino,* 2 Cir., 285 F. 2d 408, 420. Many of the loans were neither material nor relevant to the conspiracy and scheme which was charged.

C. The case was submitted to the jury without a clear instruction requiring the jury to find a single conspiracy and scheme. This is in direct conflict with *United States* v. *Borelli,* 2 Cir., 336 F.2d 376. See also *Grunewald* v. *United States,* 353 U.S. 391; *Kotteakos* v. *United States, supra.* The Court instructed the jury that in order to prove membership in the charged conspiracy, it was necessary that the Government prove beyond a reasonable doubt that the particular defendant was aware of the "common purpose". (D.A. 2143). But the jury was never apprised that it must make the crucial determination of whether the Government's evidence proved the existence of one conspiracy and scheme or of several separate conspiracies and schemes. So, contrary to *Kotteakos,* the jury was permitted to find petitioners guilty simply because one central personality may have been involved in all the transactions.

This case thus presents important questions of general applicability as to what limits on the scope of conspiracy prosecutions are necessary for a fair trial for a specific offense.

CONCLUSION

For all of the reasons advanced, the petition should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM 1965—APRIL SESSION 1966
Nos. 14892, 14893, 14894, 14895,
14896, 14897 and 14898

UNITED STATES OF AMERICA, *Plaintiff--Appellee,*

v.

JAMES R. HOFFA, BENJAMIN DRANOW, ZACHARY A. STRATE, JR., S. GEORGE BURRIS, ABE I. WEINBLATT, CALVIN KOVENS and SAMUEL HYMAN, *Defendants-Appellants.*

Appeals from the United States District Court
for the Northern District of Illinois.

October 4, 1966

Before DUFFY, *Senior Circuit Judge,* CASTLE and SWYGERT, *Circuit Judges.*

DUFFY, *Senior Circuit Judge.* The appellants herein were indicted on June 4, 1963, on twenty-eight counts. The first twenty-seven counts charged substantive violations of the mail and wire fraud statutes (18 U.S.C. §§ 1341, 1343). The twenty-eighth count charged a conspiracy to commit the substantive offenses. The jury convicted all appellants on the conspiracy count, and each appellant on certain of the substantive counts.

The Court directed a judgment of acquittal of all defendants on Counts 2, 5, 11; 26 and 27. The Government dismissed Counts 10 and 18.

Except for the interstate transmission or mailing involved, the allegations of each of the first twenty-seven

counts are, for all practical purposes, identical, alleging the same scheme to defraud the Central States, Southeast and Southwest Areas Pension Fund, often referred to in the record as the Teamsters Pension Fund or just the Pension Fund.

The indictment charged and the proof showed that defendant James R. Hoffa was president of the Teamsters International Union,[1] president of Local 299 of the Teamsters Union in Detroit,[2] and also a trustee of the Teamsters Pension Fund.

The indictment charged that the defendants conspired and did "devise a scheme and artifice to defraud the Pension Fund . . . by means of false and fraudulent pretenses, representations and promises by submitting false and misleading statements of material fact and by concealing material facts in order to obtain loans from the Pension Fund; and diverting, through various fraudulent devices, substantial amounts of the loan proceeds for their personal use and benefit."

The indictment described the alleged scheme in some detail including the following: Defendants Dranow and Burris contacted prospective loan applicants and obtained employment as their agents for procuring Pension Fund loans. Dranow and Burris induced the prospective loan applicants to retain them by holding themselves out as being in a specially favored position to obtain Pension Fund loans because of their special relationship with defendant Hoffa. Hoffa and Kovens referred some of these prospective loan applicants to Dranow and Burris. Among the loan applicants involved were defendants Strate and Hyman.

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[1] International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

[2] Truck Drivers Local 299, Detroit, Michigan.

The indictment further charged that Dranow, Burris, Strate, Hyman and Kovens participated in the preparation and submission of inflated loan applications to the Pension Fund; that these applications contained material falsifications and concealed material facts and that defendant Hoffa made misrepresentations to and concealed material facts from the trustees and staff members of the Fund.

The indictment further alleged that all of the defendants enriched themselves by causing more than $1,000,000 of the fraudulently obtained loan proceeds to be diverted to purposes other than those approved by the Pension Fund trustees. In addition, the defendants, by their participation in the scheme, allegedly obtained stock options, fees and contracts for services, construction fees, and ownership and control of borrowing corporations.

The indictment charged that in disposing of some of the diverted loan proceeds, the defendants applied more than $100,000 to the repayment of debts incurred by Sun Valley, Inc., a Florida real estate corporation, in which Hoffa had a substantial secret interest. Repayment of these debts enabled Sun Valley to extricate itself from reorganization proceedings under Chapter X of the Bankruptcy Act. Included among the Sun Valley debts that the diverted proceeds assisted in repaying was $400,000 owed by Sun Valley to a Florida bank. Repayment of this Sun Valley debt enabled Hoffa to withdraw from the Florida bank $400,000 of Teamster money which Hoffa had deposited in a non-interest-bearing account at the bank as security for the bank's $400,000 loan to Sun Valley.

Separate counts of the indictment contained allegations of the mailings, telegrams and telephone calls by which the alleged scheme was furthered. The indictment concluded by charging that all of the defendants conspired together to devise and carry out the scheme.

At the trial, the Government presented testimony and documentary evidence tending to prove the charges made in the indictment. As often happens, where a number of defendants are charged and convicted of participating in a conspiracy, counsel for appellants will present their arguments based largely on testimony favorable to or given by their clients, while completely ignoring other testimony of a contrary nature. They will, perhaps, give lip service to the well-established doctrine and rule that in resolving the issue of sufficiency of the evidence to sustain a conviction, an appellate court must view the evidence and the reasonable inferences which may be drawn therefrom in the light most favorable to the Government. *Glasser* v. *United States*, 315 U.S. 60, 80; *United States* v. *Mims*, 7 Cir., 340 F.2d 851, 852. But, after giving such lip service, the rule often is ignored. We feel that is true in the instant case.

The Government offered proof which was received in evidence as to a number of specific transactions in which various of the defendants were involved. In all of these transactions except No. 1, loans were made by the Teamsters Pension Fund. These transactions were designated as:

1. The Florida Bank-Sun Valley transactions;
2. The Connelly-Everglades transactions;
3. The Strate-Pelican Fontainebleau transactions;
4. The Hyman-Key West Foundation transactions;
5. The First Berkeley transactions;
6. The Kovens-Sager-Good Samaritan Hospital transactions;
7. The Kipnis-Causeway Inn transactions;

8. The Simon-airport hotel transactions;

9. The Strecker-4306 Duncan transactions; and

10. The Dioguardi-Club 300 loan.

Within the limits of this opinion it is not practical to discuss in any detail all of the various transactions hereinbefore listed, nor the part played in each by the various defendants. Therefore, we shall not refer in detail to more than two of these transactions.

The Government offered proof which tended to show that the scheme or conspiracy commenced in 1958 when defendant Hoffa began his efforts to rescue Sun Valley, Inc. from insolvency and thus, so the Government argues, to protect himself from possible charges that he had been misusing Union funds.

Sun Valley, Inc. was a real estate promotion in Florida. It was planned that lots in the Sun Valley project would be sold to members of the Teamsters Union as well as to others. Henry Lower, a former Teamster employee, was the president of Sun Valley. Hoffa promoted Sun Valley lot sales at Teamster meetings and had an option to purchase 45% of the Sun Valley stock. Hoffa also had countersigned $75,000 worth of Sun Valley notes of which a total of $25,000 were outstanding and unpaid. He also owned a number of lots within the project.

After Henry Lower's death, an instrument bearing Hoffa's signature was found in a cookbook in Lower's desk by his son. This document disclosed that Lower held 22½% of Sun Valley stock in secret trust for Hoffa. Although Hoffa denied that it was his signature on the document, handwriting experts at the trial testified that it was genuine.

In 1956, Sun Valley was in need of funds. The property was mortgaged. When Sun Valley applied to the Florida National Bank for loans, the bank insisted that Hoffa's local Union No. 299, at all times, maintain on deposit in the bank, a restricted non-interest-bearing account, in a sum equal to the amount of the Sun Valley borrowings. Hoffa then deposited money belonging to the Union and the bank immediately made loans to Sun Valley equalling the amount of the Union deposits.[3]

From July 1958 to July 1960, Sun Valley, being unable to meet its bills, was involved in a reorganization proceeding under Chapter X of the Bankruptcy Act. During this period, Sun Valley owed Florida National Bank $339,000 and Hoffa's Detroit Local had $400,000 tied up in the "restricted" account at the bank. On three occasions during 1959, Hoffa tried to withdraw the Detroit Local's $400,000 but the bank would not honor the checks.

Under the heading "The 'Bail-Out' Effort Begins," the Government cites negotiations with one Sanson, and offered proof to show that Sanson, a Florida business man, had a large loan application pending before the Teamsters Pension Fund trustees. In the summer of 1958, Dranow told Sanson that his loan would be put through if Sanson paid a substantial "fee" to him. Sanson agreed to do so, but told Dranow that the "fee" would be paid by check which would contain an explicit reference to the true purpose of the check. Apparently Dranow then lost interest and terminated the conversation.

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[3] On June 20, 1956, Hoffa deposited $300,000 of Teamsters funds in the restricted account. The bank loaned Sun Valley $300,000 on the same day. On November 17, 1956, Hoffa deposited an additional $200,000 of Teamsters funds, and two days later the bank loaned Sun Valley an additional $200,000.

In July 1958, Dranow and Hoffa jointly called Sanson on the telephone. Hoffa, in Dranow's presence, proposed that if Sanson would "straighten out" Sun Valley, Sanson's pending Pension Fund loan application would be granted. Hoffa suggested to Sanson that he (Sanson) would be able to obtain additional Pension Fund loans for the Sun Valley project. Hoffa said "that this was a must proposition for him, that it was something that had to be done. . . ."

Dranow and his financial agent, defendant Weinblatt, met with Sanson,[4] but Sanson turned down Hoffa's proposal.[5] The Pension Fund rejected Sanson's loan application.

In September 1958, defendant George Burris incorporated Union Land and Home Company for the purpose of rescuing Sun Valley. Burris was acting as a "front" for Dranow, and Hoffa knew of Dranow's concealed interest in the Company. Hoffa and Burris agreed that Union Land and Home Company would pay off a promissory note which Hoffa had cosigned for Sun Valley and reimburse the Teamsters Detroit Local for the interest which the Local had lost as a result of having its $400,000 tied up in the "restricted account." In exchange, Hoffa agreed to give up his Sun Valley stock option. No mention was made of Hoffa's secret agreement with Lower.

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[4] Dranow brought Kovens and Burris to meet Sanson. He introduced Burris as a man who had "great influence" with the Teamsters.

[5] Sanson wrote a report on the Sun Valley development. He recommended its abandonment and suggested that its continuance would violate the "moral obligations" owed by the promoters to the Teamster members buying lots in the project.

THE CONNELLY-EVERGLADES TRANSACTIONS

One Vaughan Connelly owned the Everglades Hotel in Miami. He sought a Pension Fund loan to finance renovation of the hotel by defendant Kovens, a Miami contractor. Kovens said he would bring in a man "who could secure the loan with the Teamsters . . . a little man . . . who always seemed to be able to deliver the goods." He brought in Dranow, introducing him as "Grossman." Dranow, in turn, brought in Burris and introduced him as an accountant for the Pension Fund who "handled all his Teamster loan applications."

During August and September 1958, Connelly discussed the proposed loan with Kovens, Dranow and Burris. The latter helped prepare the loan application. Dranow asked a $300,000 fee for procuring a $3,300,000 loan. Connelly agreed.

In January 1959, the Pension Fund trustees, including Hoffa, granted the loan, and Connelly received his first million dollar draw. Dranow and Kovens told Connelly the fee would have to be paid "under the table" in "small bills" and at once. Reference was made to the fact that "Hoffa was raising hell, ..." Dranow then got excited and told Connelly he hoped the latter would not be harmed. "These boys play rough" said Kovens.

The following day, Connelly took $100,000 in small bills to Kovens and Dranow. The inference is strong that these bills were from the proceeds of the Pension Fund loan. Kovens burned the money wrappers. Dranow stuffed the cash into a bag and left to go "to Washington to deliver the money to the Boss."[6]

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[6]At this time, both Dranow and Hoffa were living at the Woodner Hotel in Washington.

Throughout the spring of 1959, Connelly made additional "fee" payments to Kovens and Dranow. In May 1959, Dranow told Connelly "to keep out of sight" because the McCellan Committee investigators were in Miami "trying to link up Dranow and . . . pension loans with the Teamsters and with Mr. Hoffa." Kovens suggested that Connelly leave the country, but Connelly refused to do so.

However, when Committee investigators interviewed him, Connelly denied that he had made pay-offs for his Pension Fund loan. Connelly told Kovens, Burris and Dranow that he had lied to the investigators. Dranow said Connelly "had stood up for Mr. Hoffa." Later, Hoffa, referring to Connelly's denial, told Connelly that it was "a fine statement."

By late spring of 1959, Connelly was again short of funds. Dranow told him he could get him another million dollars from the Pension Fund "but it was going to cost . . . more money than the other one. . . ."

Dranow and Burris helped Connelly on his second loan application. A loan to Connelly of $1,000,000 was approved on Hoffa's motion subject to certain conditions which had not been fulfilled. At the end of a regular meeting of the Pension Fund trustees, Hoffa called what the Government has characterized as a "rump session of the Pension Fund trustees" and told them "Connelly has got to have his check today." Thereupon, Connelly got his million dollar check.

By January 1960, Connelly was once more short of money. He discussed his inability to pay his debts with Hoffa and Dranow. Connelly prepared a letter requesting a Pension Fund moratorium on all of his loan payments. Hoffa told him to make the letter stronger and get it to

the Fund prior to its March 15th meeting. Hoffa told Connelly to stay away from the meeting saying "I'll call you if I need you." At the March 15th meeting, on Hoffa's motion, the Fund trustees voted for the moratorium.

In April 1960, Connelly appearing before a federal grand jury investigating Sun Valley and Pension Fund pay-offs, denied making any pay-offs in connection with his loans. Later, he told Dranow that he had lied to the grand jury. Two months later, the Pension Fund foreclosed its mortgages on Connelly's hotel.

The evidence disclosed that Connelly had paid almost $400,000 in "fees" in connection with his loans and proof was made, which the jury was entitled to believe, that $15,000 of this money went into what the Government called "the Sun Valley bail out."

STRATE-PELICAN-FONTAINEBLEAU TRANSACTIONS

Defendant Strate was one of the principal owners of the Pelican Corporation which was constructing the Fontainebleau Hotel in New Orleans. Difficulties in financing were encountered as the building was being erected on leased land. The Pension Fund twice had rejected applications, Hoffa explaining "We cannot see the leased land."

In April 1959 representatives of Strate contacted Kovens who referred them to Dranow who later instructed them to provide $175,000 in "small bills and old money" in a safety deposit box.[7] This was done. Dranow promised

[7] The arrangements for $175,000 in small bills to be placed in a safety deposit box originally had been made for Attorney Cohen prior to any contact between Strate and Dranow. However, Strate or his representatives went along with the small bills-safety deposit box procedure.

to deliver a $1,350,000 Pension Fund loan for a "fee" of only $155,000. Strate and his partners agreed to the terms.

On June 6, 1959, Strate applied to the Pension Fund for the loan. He appeared before the Board of Trustees, being introduced by defendant Hoffa who made no mention of the "leased land" problem. In July, the Board approved the $1,350,000 loan. Within a month, Strate delivered $155,000 "in old small bills" to Dranow. This "fee" was funded by the proceeds from the Pension Fund loan.

In October 1959, Strate applied for a $2,325,000 Pension Fund loan "to build an addition to" the Fontainebleau. During these negotiations, Strate made a number of misrepresentations to the Pension Fund Board.

Between March 1960 and November 1961, Pelican received $3,350,000 in Pension Fund construction loan proceeds but only about $3,104,000 was used on the new construction. Over $200,000 was used by Strate for stock purchases, repayment of loans and payments to himself. The Government offered evidence to support its claim that almost $50,000 can be traced through Dranow and Weinblatt into "the Sun Valley bail out."

WAS THE EVIDENCE SUFFICIENT TO ESTABLISH THE CONSPIRACY AND THE CONNECTION OF EACH DEFENDANT WITH IT?

The Government had the burden to prove that the defendants conspired to and did devise a scheme to defraud the Pension Fund by submitting false and fraudulent representations and concealing material facts from the Pension Fund trustees and staff in order to obtain Pension Fund loans. It also had the burden of showing that defendants used the mail and wire services in aiding the execution of the scheme.

The burden also rested on the Government to demonstrate that the central object of the conspiracy was to obtain money for the purpose of "bailing out" Sun Valley, and that each defendant had knowledge of the conspiracy and scheme. *United States* v. *Falcone,* 311 U.S. 205; *Direct Sales Co.* v. *United States,* 319 U.S. 703, 711.

Each defendant strongly insists that the evidence did not establish the existence of such a scheme and further argues that even conceding the existence of such a scheme or conspiracy, the evidence did not connect him with it.

Although the Government was required to establish one conspiracy rather than a series of separate conspiracies, *Kotteakos* v. *United States,* 328 U.S. 750, the fact that a conspiracy's various members may play different roles in executing it, and have dissimilar motives for participating in it, does not mean that a single conspiracy does not exist.

We hold the proof in this case was sufficient for the jury to find that a single conspiracy did exist and that each defendant was a knowing member of it; that Hoffa's primary concern when the conspiracy was formed and the central purpose of the conspiracy and scheme was to "bail out" Sun Valley. Further, that Dranow, Kovens and Burris knowingly assisted Hoffa in this effort which resulted not only in the rescue of the Sun Valley project, but also in their receipt of cash payments and other emoluments.

Strate and Hyman were borrowers whose object in joining the scheme was to get large loans for their projects. Kovens, in the Good Samaritan transactions, and Burris in the First Berkeley transactions, would also fit into the borrower category. It seems clear that the borrowers' need for large loans was so great that they were willing to pay the price of joining the conspiracy. Applicable is

the statement in *Blumenthal* v. *United States*, 332 U.S. 539, 559, that all the defendants ". . . knew of and joined in the overriding scheme" and that "All by reason of their knowledge of the plan's general scope, if not its exact limits, sought a common end. . . ."

To find defendant Hoffa guilty, it was not necessary for the Government to prove that he knew every detail of the arrangement between Dranow, Burris, Kovens and the borrowers. It also was unnecessary for the Government to prove that the borrowers knew the details of other loans placed through Hoffa for the evidence was sufficient to support the jury's finding that all had a stake in the common venture.

Defendant Hoffa urges that the Pension Fund did not actually lose money on the loans involved in this case. However, due to the long term nature of the loans and the fact that subsequent loans were made to refinance earlier loans, it was impossible to ascertain with certainty whether or not a loss occurred. In any event, it is well established that actual loss is not an essential element of the crime. *United States* v. *Sylvanus*, 7 Cir., 192 F.2d 96, 106.

The Fontainebleau Hotel loans illustrate the defendants' involvement in procuring otherwise doubtful Pension Fund loans for applicants who were willing to pay the price, and also demonstrate how loans were granted which, undoubtedly, would not have been made if all the actual facts had been known.

Strate and his group had twice failed to obtain loans from the Pension Fund due to the fact that their hotel was being built on leased land. However, when Dranow and Burris intervened, and Dranow was promised a fee of $155,000, the loan was approved.

A second loan of $2,235,000 was made to Strate and his group for additional construction on the Fontainebleau Hotel. The Government offered proof to show that during the negotiations for that loan, Strate made false representations to the Pension Fund trustees regarding past and future expenses and the presence of the requisite owner's equity.

The Government also proved that defendant Hoffa called the Pension Fund appraiser and informed him that although the owner's equity requirement had not yet been made for the above loan, the applicants would be able to meet within sixty days. Seventeen days later, the Pension Fund issued its letter of commitment granting the full $2,350,000 loan.

The type of misrepresentation found in connection with the granting of the Fontainebleau loans is illustrative of those made in connection with other loans in this case.

Defendant Hoffa argues that his interest in helping Sun Valley was motivated only by his desire to help the Teamsters, but the jury apparently was unimpressed by his protestations of good faith. It was entitled to believe the testimony that Hoffa considered the "bail out" of Sun Valley, a "must proposition." From the evidence submitted, it undoubtedly rejected Hoffa's proffered motive and concluded that Hoffa's interest in "bailing out" Sun Valley was generated by other considerations.

One of these considerations was Hoffa's financial interest in Sun Valley discussed above. Another and perhaps for more important one which the jury could have considered, was Hoffa's use of $400,000 of Teamster money to secure Sun Valley's financial position. The jury could have concluded that in light of the McClellan Committee investigation, Hoffa was most anxious to get this money

out of the Florida bank and return it to the Union Local. This conclusion may have been further buttressed by the testimony that Hoffa had congratulated Connelly for lying to the McClellan Committee about the Pension Fund loan pay-offs.

Finally, Hoffa's claim of good faith interest in Sun Valley runs afoul of the fact that his secret connection with Sun Valley could properly be regarded as a violation of his fiduciary duties to the beneficiaries of the Teamster Pension Fund.

Dranow's connection with the scheme is clearly evident. He took an active part in the conspiracy at every step. He was active in placing all the larger loans. He succeeded in obtaining substantial amounts of money for himself and his claim that he sought only legitimate finders' fees apparently did not ring true to the jury. His insistence on his fees from Connelly and Strate being paid in "small old bills" and having Connelly falsify to the McClellan Committee as to the Everglades loan, all belie his claimed innocence.

It is not necessary to discuss Dranow's attack on the substantive mail counts, as his conviction on the conspiracy count sustains the sentence imposed on him. *Lawn* v. *United States,* 355 U.S. 339, 359.

Defendant Burris argues he was also merely engaged in the legitimate business of obtaining finders' fees for placing loans. However, the evidence discloses that Burris was involved far beyond an interest in legitimate finders' fees. Dranow introduced Burris to Connelly as the accountant who handled all of his Teamster loan applications. The jury was entitled to believe that Burris was a co-conspirator who had an active part in obtaining fraudulent loans from the Pension Fund, using the pro-

ceeds of inflated loans to help extricate Sun Valley as well as to make a profit for himself. Burris took an active part in the Everglades loans to Connelly and the Key West loan to Hyman. Furthermore, Burris became the accountant for the Strate Fontainebleau group at the time they were applying for a second loan.

Defendant Kovens was not involved in all of the transactions proved. However, there was sufficient evidence for the jury to conclude that he was a knowing member of the conspiracy and scheme to defraud the Pension Fund.

As early as July 1958, Kovens brought up the possibility of Connelly taking over Sun Valley. He later introduced Connelly to Dranow whom he called "Grossman," as an individual who could secure Pension Fund loans. It was also Kovens who suggested to Connelly that he leave the country until the McClellan Committee investigators left town.

In addition, the Government offered proof of misrepresentations made by Kovens to the Pension Fund trustees in connection with the Good Samaritan Hospital loans, and showed that it was Kovens who brought Dranow into the Strate Fontainebleau Hotel transactions.

We find that the evidence would have warranted the jury in concluding that Kovens was involved in the conspiracy and scheme in numerous other respects.

Undoubtedly, defendant Hyman was principally interested in obtaining loans for his various business projects. However, we find that from the evidence, the jury could have concluded that Hyman was a member of the conspiracy, finding that he knew the price of obtaining a Pension Fund loan through Dranow and Burris was a finders' fee that would help Dranow and others to extricate Sun Valley.

Hyman admitted investing $100,000 in Union Land and Home Company, the company formed for the purpose of "bailing out" Sun Valley. He also advanced $50,000 to pay creditors of Sun Valley in May 1960. Evidence was offered to show that he was repaid for this advance out of the proceeds of a $400,000 Pension Fund loan. The application for this loan was made in the same month that Hyman made his advance to pay Sun Valley creditors.

The timing of the advance and the loan application is curiously coincidental. When the fact is added that Hoffa supported the loan with false statements, the inference readily appears that the granting of the loan was not on its merits, but as a result of a conspiratorial agreement.

The role of defendant Strate has been discussed above in connection with the Fontainebleau loans. The fact that he and his group had been unable to secure a Pension Fund loan until Kovens brought Dranow into the picture and agreed to pay the latter a finder's fee of $155,000 is significant. The loan went through on Hoffa's motion and Dranow notified the Strate group that the loan had been approved before it received formal notification. Considering all this, the jury could well have concluded that the loan was not made on the merits but as a result of the conspiracy.

Weinblatt was a lesser member of the conspiracy. He was Dranow's agent and his nominee of a number of bank accounts. He acted as such because Dranow wanted his own interest in these accounts concealed from investigators. The District Judge imposed a sentence of one hour in custody and a fine of $5,000. Although Weinblatt was not of great importance in the scheme, the jury did have a basis for holding that he was knowingly implicated in the conspiracy.

QUESTION OF SEVERANCE

A number of defendants claim error because their motion for a severance was denied. However, as they were all part of one conspiracy, it was proper to try them together. *Blumenthal* v. *United States,* 332 U.S. 539; *Schaffer* v. *United States,* 362 U.S. 511, 514.

Hoffa and Kovens complain that it was prejudicial for them to have been tried with Dranow because the personality of the latter would naturally antagonize a jury. We do not think that this complaint amounts to error in view of the extremely close association of Hoffa and Kovens with Dranow in various loan transactions.

DENIAL OF SPEEDY TRIAL

Hoffa and other of the defendants claim they were denied their constitutional right to a speedy trial. There was a delay due to the Hoffa trial in Tennessee. The instant case went to trial on April 27, 1964, about six weeks after Hoffa's conviction in Tennessee, and some eleven months after the return of the indictment. The Tennessee indictment had been returned prior to the indictment in the instant case. Under the circumstances, we hold that there was no abuse of discretion on the part of the trial judge in postponing the trial, and we hold that defendants were not denied their constitutional right to a speedy trial.

ALLEGED ERRORS AT THE TRIAL

The trial of the instant case extended over a period of three months. At least six of the attorneys for the various defendants were actively engaged in the defense. It would have been quite unusual if some errors had not occurred during that extended period. However, as the Supreme Court has stated, the test is that "A defendant is entitled to a fair trial but not a perfect one." *Lutwak* v. *United States,* 344 U.S. 604, 619.

We shall now consider and discuss a number of the alleged errors which the defendants claim to be prejudicial and which, they argue, require a reversal and a remand for a new trial.

ALLEGED ERROR IN THE SELECTION OF GRAND AND PETIT JURORS

Defendants Burris, Hoffa and Kovens claim that the manner in which the grand and petit jurors were selected constituted prejudicial error. They claim that these jurors were improperly drawn because the Jury Commissioner did not participate in the drawings[8] and because the names were not read aloud as they were drawn from the box.

The challenge to the grand jury array has been waived by laches. Defendants were arraigned on June 25, 1963. They indicated a willingness to forego all pretrial motions if they were granted an immediate trial. The trial judge explained that a trial date was not possible until the coming fall, and granted them twenty days to file any motions. Many motions were filed seeking discovery, bill of particulars, severance, and attacking the indictment in whole or in part. The case was called for hearing on March 23, 1964. On April 9, 1964, a motion was filed challenging the petit jury array. It was not until April 13, 1964, that a motion was filed challenging the grand jury array. This was an unreasonable delay. *Hyde* v. *United States*, 225 U.S. 347, 373. It was filed after the time permitted by Rule 12 (b), F.R.Cr.P.

28 U.S.C. § 1864, provides that the names of the jurors "shall be publicly drawn from a box containing the names

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[8] 28 U.S.C. Section 1864 requires participation by the Commissioner in the placing of names in the jury box, but there is no provision as to the person who must draw the names from the box.

of not less than three hundred qualified persons at the time of each drawing." Pursuant to the practice in the District Court, the clerk of court, assisted by two deputies, drew the jury panel. Defendants requested that the names drawn for the petit jury be read aloud. The trial judge held that such a procedure would not be necessary in order for the drawing to be a public one under § 1864. To insure that the potential jurors would not be approached by either the Government or defendants prior to the selection of the jury, the Judge ordered that until the voir dire, their names were not to be disclosed to counsel on either side, the marshal or the court itself. The list was locked in the clerk's vault. 28 U.S.C. § 1864 requires that the jury be publicly drawn, but it does not require nor do we interpret it to mean that the names must be read aloud. No efforts were made to keep secret the fact that a jury was being drawn. The trial judge was, undoubtedly, extremely sensitive to the idea of possible jury tampering, and was taking extra precautions so that the prospective jurors would remain free from any contamination. We hold prejudicial error was not committed in following the procedure here outlined.

DEFENDANTS CLAIM ERROR DUE TO EMPANELLING PROCEDURES

Certain of the defendants claim prejudice because the court limited the defendants to eighteen peremptory challenges; also, because they were not permitted to ask certain questions of the potential jurors, and because the trial judge at first limited their time with each venireman, and later took over the questioning himself.

The selection of the jury in this case consumed ten court days. Over 500 veniremen were questioned on the voir dire before the twelve jurors and four alternates were chosen.

The Federal Rules of Criminal Procedure entitle non-capital defendants, whether tried singly or jointly, to no more than ten peremptory challenges as a matter of right. There is no constitutional or statutory right to a greater number. *Stilson* v. *United States,* 250 U.S. 583, 586-7; *Schaefer* v. *United States,* 251 U.S. 466, 470.

Defendants also complain that they were not permitted to inquire into certain subjects such as the political affiliations of the prospective jurors, or whether a venireman had ever crossed a Teamsters picket line.

We hold that under the circumstances present, and considering the length of time consumed in the process of selecting jurors, the trial court acted within its discretion in foreclosing inquiries which seemed to be of a dilatory nature.

As to the judge taking over the examination of potential jurors, a defendant in a criminal case does not have a right to have his counsel question each venireman on the voir dire. *Paschen* v. *United States,* 7 Cir., 70 F.2d 491, 495. Furthermore, Rule 24 (a), F.R.Cr.P., permits the trial judge, in his discretion, to conduct the examination himself. This rule has been held to not violate any constitutional right of a defendant. *Hamer* v. *United States,* 9 Cir., 259 F.2d 274. We find no error with respect to the manner in which the jury was selected.

PREJUDICIAL PUBLICITY

All defendants claim they were prejudiced by publicity directed toward the defendant Hoffa, charging much of this publicity was generated by the Government. Particular complaint is made of the public clashes between the then Attorney General, Robert F. Kennedy, and the defendant Hoffa.

Defendants argue that the trial court failed to take adequate action to protect them from various kinds of prejudicial publicity. They assert that during the period of the jurors' selection, Look Magazine published a story concerning an alleged plot by Hoffa to assassinate Robert F. Kennedy, and that shortly thereafter, Life Magazine ran a similar article.

Selection of jurors commenced on April 27, 1964, and continued to May 11. On May 1, Attorney General Kennedy spoke at a Law Day observance at the University of Chicago. During a question and answer session with students after the speech, Kennedy admitted he had heard the charges made by one Edward G. Partin that Hoffa was interested in the suggested assassination of him. Although the Attorney General's answer was not given in an interview with the press, a news story based on the statement did appear in the newspapers.

Whenever any person of prominence is charged with a crime, the story usually will receive wide distribution through various news media. It may be impracticable to postpone the trial for a period long enough for public interest to die down. As the Ninth Circuit Court of Appeals said of Dave Beck (*Beck* v. *United States,* 298 F.2d 622, 628)— " . . . it seems obvious that it would be impossible ever to bring this defendant to trial if it were necessary to await a complete abatement of all publicity concerning a man so much in public view."

The fact that a juror may have read newspaper accounts or heard comments on radio or television relative to a criminal charge is alone not sufficient ground for excusing a prospective juror. *Finnegan* v. *United States,* 8 Cir., 204 F.2d 105, 110. It is not required that jurors be totally ignorant of the facts and issues involved. *Irvin* v. *Dowd,*

366 U.S. 717, 722. In the latter case, the Supreme Court said at page 723—"To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court."

The voir dire examination is the proper place to determine whether a defendant's public notoriety has resulted in a prospective juror's prejudice. Although counsel for defendants complain that they were unduly restricted on the voir dire, we do not think this is true. Some ten court days were consumed in obtaining the jurors who sat on this case. As each panel of veniremen entered the box, the trial judge informed them that only those who could put aside any past opinions and reach a decision entirely on the evidence presented in court were desired as jurors. Each veniremen was asked if he could do so, and those who expressed any doubt as to their ability in this regard, were excused.

A reading of the transcript of the proceedings extending over a two weeks' period is convincing that the jurors selected were not prejudiced by publicity as to Hoffa or otherwise.

JURY SEQUESTERED AT GREAT LAKES NAVAL STATION

The sequestered jury was taken from a downtown Chicago hotel and removed to the Bachelor Officers' quarters at Great Lakes Naval Station. All of the defendants claim such action was error, and the defendant Hoffa suggests that the jury was kept "... under virtual military imprisonment [which] was violative of the Fifth [due process] and

Sixth [public trial] amendments." Hoffa further argues that such a sequestration ". . . is patently at odds with the basic American tradition deploring any interference by the military with the regular administration of justice in the civil courts."

We hold that in view of the notoriety given to the trial, sequestration of the jury was entirely proper. Furthermore, the trial judge knew of recent charges of alleged jury tampering and naturally thought it advisable to keep the jury isolated.

The quarters at the Great Lakes Naval Station were separate and comfortable. They were within one hour's drive from the federal courthouse. The jury could more easily be kept isolated at these quarters than in a crowded downtown hotel where jury contact with hotel employees such as bellboys and elevator operators would necessarily be frequent.

The place where the jury was to be kept was within the sound discretion of the trial judge. We hold that there was no abuse of that discretion and that there was no error committed by reason of quartering the jury during the trial at the Great Lakes Naval Station.

JUROR LEE WAS EXCUSED

Near the close of final arguments, the trial judge received information from the attending doctor that the ninety-two year old mother of Juror Lee had undergone major surgery for a broken hip, and that he did not expect her to leave the hospital alive. The Judge asked the parties whether they wished to continue with eleven jurors in the event of the lady's death during deliberations, or whether they would prefer to have the first alternate juror replace Lee before the deliberations began.

Counsel for defendants suggested that Lee be consulted as to whether he wished to be excused, but if the Court refused to do so, they would prefer proceeding with the alternate juror substitution. The trial judge did not desire to consult with Juror Lee and did not do so. He excused Lee, and the trial proceeded with the first alternate juror sitting as a member of the panel.

We hold the trial judge did not err in excusing Juror Lee without having consulted him as to whether he wished to be excused.

SUBMISSION OF COPY OF INDICTMENT TO JURY

During the deliberations of the jury, its foreman handed the Deputy Marshal in charge a sealed document which was delivered to the Court. The document requested information, but was ambiguous as to what specific information the jury desired. It referred to "work papers" and mentioned "document of all counts," "document of law on all counts" and "document of overt acts named." Several rows of numbers were also listed, apparently indicating the twenty-one counts then remaining in issue and the seven counts which had been dismissed.

As seven of the twenty-eight counts had been dismissed, the jury may well have been in doubt as to which were the seven counts no longer in the case. However, upon reading the jurors' request, the trial judge told the Deputy Marshal to give a copy of the entire indictment to the jury and to tell them "they can have this [the indictment] and nothing more." None of the defendants or their attorneys were then present. The Deputy Marshal gave the indictment to the jury and related the Court's oral message.

It was later discovered that the copy of the indictment which had been sent in to the jury, contained certain ink

markings. The Court indicated that it had not placed these markings on the copy of the indictment at the time it was sent to the jury room.

The principal marking on the indictment was the word "out" written immediately after the subheads of count 5, count 10, count 11, count 18, count 26 and count 27. All of these counts either had been stricken by the Court or dismissed by the Government.

The only other marks on the copy of the indictment were lines drawn through the name of Herbert R. Burris who had been dismissed from the case, and two small markings near Hoffa's name in a sentence relating to a telephone call between Hoffa and one Maurice A. Lieberman. It would appear that the markings on the copy of the indictment were made by some member or members of the jury, and were in no way prejudicial to Hoffa or the other defendants.

It is urged, however, that the trial court committed reversible error in communicating orally with the jury and in sending in the copy of the indictment in the absence of defendants and their attorneys. Defendants insist that the trial judge stated he would notify the parties and their counsel if any questions were asked by the jury during deliberations.

Undoubtedly, the trial judge assumed that it would assist the jurors to have the indictment before them so as to enable them to relate the counts of the indictment to the various transactions. The trial judge knew this would be a problem and earlier had suggested a form of verdict which would have identified the counts, such as putting "Everglades" at the top of Count 2. However, defendants objected and this was not done. The Court asked for sug-

gestions as to how the counts could be better identified for the jurors, but counsel for defendants had none.

In *United States* v. *Press, et al.*, 2 Cir., 336 F.2d 1003, a somewhat similar situation was discussed at page 1016. The Court said: "It is not improper for the court to read the indictment in its entirety or portions thereof to the jury (citations). Indeed, in protracted cases involving numerous counts such as this one, reference to the indictment often serves as a helpful guide in delineating the issues the jury may be called upon to decide. Similarly, it is not error to give the indictment to the jury for use during its deliberations (Citing cases). The decision to do so rests in the sound discretion of the court."

The defendants claim that the copy of the indictment transmitted new information to the jury, since in reading the indictment to the jury, the court had omitted certain portions. However, the Court repeatedly had advised the jury that the charges in the indictment were not evidence of guilt. To illustrate, the Court told the jury "As you have heretofore been advised, the indictment which has been returned by a grand jury is not any evidence of guilt and must not be construed by you as such." Again, the Court pointed out in reading a portion of the indictment—"That these are mere allegations in the indictment which are not proof of anything." At another point the Court said to the jury—"Now, again, I tell you that the indictment in this case is no evidence of the defendants' guilt . . . You must not be prejudiced against the defendants because an indictment has been returned against them."

We note that counsel for defendant Hoffa had earlier indicated he wanted the jury to know that a number of counts had been dismissed and that other portions of the indictment had not been proved. He said the jury was

entitled to know that the Government "flunked 25% of the course; that is, seven counts out of twenty-eight went down . . . ."

It was not good practice for the trial judge to have sent the brief message and indictment to the jury in the absence of defendants and their counsel, but it is obvious that the indictment was the only thing the Court sent to the jury whether or not anything was said. No further instructions were given as was the situation in the majority of cases relied on by the defendants See *United States* v. *Neal*, 3 Cir., 320 F.2d 533; *Evans* v. *United States*, 6 Cir., 284 F.2d 393, and *Rice* v. *United States*, 8 Cir., 356 F.2d 709, 717. Under the circumstances then present, we hold that the procedure now complained of was not prejudicial and does not warrant a reversal of defendants' convictions. *United States* v. *Compagna*, 2 Cir., 146 F.2d 524; *Walker* v. *United States*, DC Cir., 322 F.2d 434.

EVIDENCE OF HOFFA'S PRIOR CONVICTION

On May 9, 1963, Hoffa was indicted in the United States District Court for the Middle District of Tennessee on a charge that he wilfully endeavored to influence, intimidate and impede petit jurors in the discharge of their duties in violation of Title 18 U.S.C. § 1503. The indictment in the Tennessee case was returned prior to the time that the indictment was filed in the instant case. The jury in the Tennessee case found Hoffa guilty of the charge, and the United States Court of Appeals for the Sixth Circuit affirmed. *United States* v. *James R. Hoffa*, 349 F.2d 20.[9]

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[9] The Supreme Court later granted certiorari limited to one question. *Hoffa* v. *United States*, 382 U.S. 1024.

In the instant case, defendant Hoffa took the stand in his own behalf. At the beginning of the cross examination, Hoffa admitted he had been convicted in March 1964 of endeavoring to obstruct justice by tampering with the federal district court jury, his verbatim answer being "Yes, by perjured testimony of an admitted kidnapper." Hoffa now claims the Court committed prejudicial error in permitting the Government to impeach him by adducing testimony of his conviction which was then pending on appeal.

The trial court relied on our decision in *United States* v. *Empire Packing Company,* 7 Cir., 174 F.2d 16, 20, cert. den. 377 U.S. 959. The panel or division of our Court in that case consisted of Judges Major, Minton and Wham. On this appeal, the Government likewise relies on *Empire Packing* and states that *Bloch* v. *United States,* 9 Cir., 226 F.2d 185, 188, is in accord.

Hoffa relies on our decision in *United States* v. *Levi,* 7 Cir., 177 F.2d 827 [Major, Minton and Duffy]—apparently considering that our decisions in *Empire Packing* and *Levi* are inconsistent. We do not agree.

In *Empire Packing* we said: ". . . An accused, taking the stand in his own defense, may be cross examined regarding a prior conviction for a felony as affecting his credibility (citing cases). The fact that Chapman's conviction for income tax evasion was pending on appeal, as brought out in the trial court, did not render the cross examination improper. Unless and until the judgment of the trial court is reversed, the defendant stands convicted and may properly be questioned regarding said conviction solely for the purpose of testing credibility. (Citing cases) . . . ."

In *Levi,* the Assistant United States Attorney asked Levi if he were the same Levi who was convicted a few

days previously in a tax evasion case. We held this question was error because Government counsel knew or should have known that a judgment of conviction had not been entered in that case, and that the trial court still had the motion for acquittal under consideration. Judge Minton wrote a dissenting opinion expressing the view that there was no reversible error. The circumstances that surrounded the impeaching question in *Levi* are certainly distinguishable from those of the case at bar.

We cannot say that the trial court committed reversible error in following the law in this circuit. No authorities have been cited to us to convince us now that our previous decision in *Empire Packing* was erroneous.

An additional reason for finding no prejudicial error in the impeaching question is that Hoffa's experienced and able counsel did not object to the question when it was asked. In fact, in his closing argument to the jury, counsel said: "But the first thing that Mr. Bittman [Government Counsel] went to for Mr. Hoffa like, a grip, and *it is proper cross examination—I didn't object*—'Are you the James R. Hoffa who was convicted in Chattanooga?' " [Emphasis supplied] Counsel for Hoffa then told the jury that the Tennessee conviction was on appeal, and that the Government's use of it for impeachment purposes indicated a lack of confidence in both the Tennessee conviction and in the instant prosecution.

Several of defendants' trial counsel including counsel for Hoffa had previously conferred with the trial judge requesting advice as to his ruling should any former convictions of the defendants be brought out on cross examination. The trial judge informed them that he would permit the Government to bring out the prior convictions on the authority of *Empire Packing*. It is, therefore, quite

apparent from this and counsel's above comments to the jury that counsel for Hoffa deliberately decided not to enter an objection to the impeaching question. We hold that it was not reversible error to ask witness Hoffa if he had previously been convicted.

TESTIMONY OF ALTERNATE JUROR PARE

Defendants filed an additional and supplemental motion for a new trial based upon information coming to them through alternate juror Pare. At a hearing held after the jury had returned its verdict and had been dismissed, Pare testfied that during the trial, a member of the jury had shown him a Chicago newspaper article concerning the trial court's exclusion of the Link-Dranow letters discussed *infra*. Pare testified he had read the article but that no conversation had occurred in connection with it.

It appears that while the jury was at Great Lakes Naval Station, newspapers were available to them. However, any articles referring to the trial of the instant case were cut out before the jurors received the papers. We surmise that the article in question was missed because of its inconspicuous placement between the obituary column and the church announcements.

There was no evidence of any outside influence on the jury and from Pare's testimony, it appears that, for the most part, the jurors followed the Court's admonition not to discuss the case among themselves until the case was finally submitted to them for decision. We think, under all of the circumstances present, that these matters brought to the attention of the trial judge after the verdict were not sufficient to require an inquest by the Court or the granting of a new trial. We find no error in the Court's refusal to call back the jury for examination or in its denial of a new trial.

ALLEGED ERRORS AS TO RECEIPT AND EXCLUSION OF EVIDENCE

The defendants urge numerous claims of error based upon the admission or exclusion of evidence. Perhaps the alleged error most strenuously urged by defendants relates to the Link-Dranow letters.

On cross examination, defendant Dranow was asked if he had written a letter to George Burris stating "Everything can be blamed on me, and everything that could be put on me to protect the others should be blamed on me. . . ." Dranow answered he did not recall writing the letter although it was in his handwriting.

Dranow was then asked if he had written a second letter designating certain persons including some of the defendants, who should put aside sums of money ranging from $5 to $15 per day, to be eventually turned over to him. Upon objections, the Court instructed the jury to consider this matter only as to Dranow. The witness again answered he could not recall writing the letter, nor did he recall delivering either of the letters to Mr. Irving Link, but admitted that the second letter was also in his handwriting.

Both initially and at the end of the testimony, the Court instructed the jury to consider this evidence only as to defendant Dranow. However, later the Court decided that the possible prejudice to the other defendants outweighed the testimony's relevance and it instructed the jury to disregard the testimony of both Dranow and Link as to these letters, and not to take this testimony into consideration in arriving at its verdict.

We hold there was no error as the letters were admissible to impeach Dranow. The trial judge exercised wise discretion in refusing to grant a mistrial, and he protected

the rights of the other defendants by directing the jury to entirely disregard the letters.

The other claimed errors relating to the admission or exclusion of evidence, including evidence as to benefits payable by the Pension Fund, have been considered, and we hold there was no prejudicial error.

Other contentions by some or all of the defendants as to production of corporate documents, that the trial judge was guilty of misconduct, as to Government counsel's comments in arguing to the jury, and that certain instructions were erroneous, all have been carefully considered. We find no error therein. Each claim of error by counsel for defendants has been carefully considered and all such claims of error are hereby denied.

The judgments of conviction in each of the appeals, Nos. 14892, 14893, 14894, 14895, 14896, 14897 and 14898 are

AFFIRMED

Nos. 14892, 14893, 14894, 14895, 14896, 14897 and 14898.

SWYGERT, *Circuit Judge,* dissenting.

My dissent is based upon several grounds. First, a number of trial errors independently require a reversal of the convictions of all defendants. Additionally, a reversal without remand is required as to certain defendants because the Government's proof sustained neither a single scheme to defraud the Teamsters' Pension Fund as charged in the indictment, nor a single, overall conspiracy to violate the mail fraud statute as alleged.

My apology for the length of this dissent rests largely on the fact that the evidence as to many of the loan transactions must be discussed briefly.[1] Only then does it become apparent that there was a fatal variance between the charges and the proof and that much irrelevant, prejudicial evidence was submitted to the jury. Moreover, in order to demonstrate that prejudicial trial errors occurred, certain relevant background facts must be stated. Several trial errors will be discussed first.

I.

1. THE IMPEACHMENT OF HOFFA BY THE TENNESSEE CONVICTION

In my opinion the district court committed reversible error in permitting the Government to impeach the defendant Hoffa by his conviction of jury tampering in a federal district court in Chattanooga, Tennessee.[2] The

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[1] The facts were multifarious and complex. The trial lasted three months. The record consists of approximately 17,000 pages of testimony and trial proceedings.

[2] *United States* v. *Hoffa,* 349 F. 2d 20 (6th Cir. 1965), *cert. granted,* 382 U.S. 1024 (1966).

impeaching evidence should not have been permitted to be used because of the Government's ordering of the Chattanooga and Chicago indictments to create an atmosphere of prejudice against all defendants through an otherwise unrelated, factually subsequent conviction of one of them.

The indictment against the defendants in the instant case was returned on June 4, 1963,[3] less than one month after Hoffa was indicted for jury tampering in Tennessee. The facts giving rise to the Tennessee charge, however, occurred sometime after those which prompted the prosecution of the present case. At the arraignment in this case in June 1963 all defendants announced that they were ready for trial and offered to waive all pretrial motions in order to obtain a speedy trial. The Government resisted all such efforts, however, stating that it wanted to try the Tennessee case first because it involved "one of the defendants" named in the indictment. The district judge acceded to the Government's position. The Tennessee case began in January 1964, and Hoffa was convicted of jury tampering on March 4, 1964. Following Hoffa's Tennessee conviction, all defendants moved for a continuance of the instant trial, which had been set for April 27, because of the fear of prejudicial publicity and the use of Hoffa's conviction for impeachment purposes pending its appeal. These motions were also denied and the trial proceeded as scheduled.

In this manner the Government was permitted to arrange the trial date in this case so that the Tennessee

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[3] On the same day, in the federal district court for the Southern District of Florida, the Government moved to dismiss an indictment returned in October 1961 which charged Hoffa with mail fraud and conspiracy in connection with the promotion of the Sun Valley enterprise among Teamsters locals and their members.

case could be tried first and thereby be used for impeachment purposes even though only a single defendant was involved therein and even though that conviction was for an offense occurring subsequent to the alleged offenses being tried in the instant prosecution. In these circumstances this court should adopt the view expressed by the Pennsylvania Supreme Court in *Commonwealth* v. *McIntyre*, 417 Pa. 415, 208 A.2d 257 (1965). In treating a similar situation, that court stated:

> Generally, the scheduling of criminal trials is a matter within the discretion of the Commonwealth. We are unwilling to allow opportunity for arranging the trial of cases so that a criminal record might be created where the record would not otherwise exist were the earlier offenses tried promptly.
>
> What we here decide is that on the particular record facts and circumstances of this case the introduction of the defendant's criminal record of crimes committed subsequent to the charge being tried was unduly prejudicial and unfair. This requires that the conviction be set aside and that a new trial be had. Especially is this so because, in this instance, the prejudice created by the introduction of the subsequent criminal record far outweighed the Commonwealth's need in the trial of the case, as an evidentiary circumstance, to impeach defendant's credibility by use of these particular records.
>
> If for some compelling reason the local trial calendar or the orderly administration of criminal justice is better served by trying a subsequent offense first, then a criminal record so created should not be admissible against a defendant in his later trial. . . . 208 A.2d at 261.

Furthermore, there was no waiver by Hoffa's counsel of an objection to the impeaching testimony. The question of its admissibility was raised both at a pretrial hearing

and during the trial in advance of Hoffa's testimony, when the district judge was asked whether he would permit the disclosure of the Tennessee conviction. The record permits no doubt that its admissibility was challenged on both occasions. The Government objected to a ruling in advance of Hoffa's taking the stand.[4] The judge, however, ruled that he would allow the impeaching question to be asked and answered even though the Tennessee conviction was pending on appeal. Given this ruling, it is understandable from the standpoint of defense trial strategy that no formal objection to the impeaching question was raised when it was put to the witness before the jury and that Hoffa's counsel argued as he did in reference to the Tennessee conviction in his summation. Once an objection is unqualifiedly interposed, there is no requirement that it be renewed at the risk of waiver.

2. The Letters Used To Impeach Dranow

The defendant Benjamin Dranow testified in his own behalf. At the time of the trial he was under sentence in a federal prison for convictions of mail fraud, income tax evasion, and bail-jumping. His competency had been challenged during the voir dire examination after the district judge disclosed that he had received a long, rambling, and rather incomprehensible telegram from Dranow. During the trial Dranow made frequent outbursts and had many verbal clashes with the judge, the attorneys, the marshals, and even spectators. As a witness, he was

[4] If the Government had been successful in this endeavor, the tactic would have permitted the question to be asked even though the court might not have permitted it to be answered.

vulgar and boisterous.[5] Repeated defense motions for a mistrial or a severance from Dranow were denied.

During Dranow's cross-examination, the prosecutor inquired:

> Mr. Dranow, did you ever write a letter to S. George Burris in which you told him, "Everything can be blamed on me, and everything that could be put on to me to protect others should be blamed on me. But don't let that affect your feelings toward me in any way whatsoever."

Defense counsel objected. The judge overruled the objection with the statement that if the question were answered, it must be "followed up." The prosecutor assured the court that this would be done. After further objection that the communication inquired about was "after the alleged offense," the court instructed the jury to consider the matter only as to Dranow for the purpose of impeachment. Motions for a mistrial and a hearing outside the presence of the jury were denied. Dranow, after being shown the letter, which was undated, admitted it was in his handwriting, but said he did not know when he sent it or to whom it was written.[6]

Dranow was then asked:

> Did you write a letter, Mr. Dranow, saying: "I want the following amounts put away for me from each of the following persons each day. I want all this money put in one spot where it will be picked up four or five times a year and enable me to pay

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[5] As a rather mild illustration, when Dranow was asked on cross-examination whether he had any connection with the Teamsters' Pension Fund, he replied, "Yes, I'm their representative in the prison. If the prison wants a loan, I will recommend it."

[6] The salutation on the letter read "Dear George."

for the new place and business: a. The California buildings, $10 per day; b. George Burris, Irving ask George $10 per day; c. Sam Hyman, George, ask Sam $10 per day; d. Cal Kovens, George ask Cal, $10 per day; e. Glen Hillborn Fashion Mart Building, George ask Glen, $5 per day; f. Lou Gladstone, Milton talk to Lou, $15 per day." Did you write that, sir?

Objections to this question and motions for severance were again overruled, and the judge again limited the evidence to Dranow. Dranow replied that the letter was in his handwriting, but that he didn't recall the details of when he had written it or whether it had been delivered to Irving Link.

Irving Link, who had testified during the Government's case-in-chief, was later recalled as a rebuttal witness. Link testified that Dranow told him in September 1962 that there would be mail addressed to a friend of Dranow's, Buck Traub, which was meant for Link. Link said that a letter, thus addressed, later proved to contain the two letters about which Dranow was questioned.

Subsequently, the judge refused to admit the letters into evidence. He referred to the prejudicial nature of the letters, noted that an "inference" could be drawn that they referred to Dranow's other prosecutions, and also commented that "weighing the dangers against the benefits. I am going to protect this record." Later the judge instructed the jury to disregard the testimony of both Dranow and Link in regard to the letters.[7]

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[7] The cautionary instruction given reads as follows:

Among the last witnesses you hear in the last testimony you heard was some testimony about a witness by the name of Link, and the cross-examination of Mr. Dranow.

In the course of interrogation of Mr. Dranow and the inter-

If the communications just discussed were relevant at all, a conclusion subject to considerable doubt, they were admissible only to impeach Dranow.[8] Indeed the trial judge so recognized, at all times attempting to limit consideration of the letters by the jury to that defendant. The majority opinion assumes without discussion that the admissibility of these communications against Dranow, attended by cautionary instructions to the jury, effectively disposes of the other defendants' objections. The possible relevance of the documents to the impeachment of Dranow, however, is not determinative of the most important question raised. The crucial question is whether the disclosure of the contents of the letters was so prejudicial to the other defendants that the prejudice could not be cured by the final exclusion of the letters from the evidence, that is, whether the other de-

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rogation of Mr. Link, some reference was made to some letters.

The court instructs you to disregard the testimony of both Mr. Dranow and Mr. Link in regard to those letters, and do not take that into consideration in any way in arriving at your verdict.

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[8] The Government argues in this appeal that the letters were admissible against Dranow because they were received by Link during the existence of the conspiracy and, alternatively, that they were admissible against all defendants as "verbal acts . . . relevant to prove the existence of a conspiracy." Aside from the fact that this belated argument appears designed to avoid meeting head-on the defendants' principal contention relating to the inherent prejudice of the letters, the argument is without merit. First, Sun Valley was completely rehabilitated and Local 299 had recovered its funds when the letters were received. Second, the letters could not qualify as "verbal acts" inasmuch as they were not written in explanation of an independently material act.

fendants were entitled to a severance from Dranow because of the prejudice so injected by the prosecutor.

There is only one answer to this question. The letters were inherently prejudicial to all defendants. Together they conveyed a strong inference of guilt of all; as to those named in the second letter, the inference was inescapable that they were guilty of some misconduct for which they could be blackmailed for an indefinite period of time. Asking a jury to compartmentalize or disregard such evidence was an impossible task[9]. There can be little doubt that the prosecutor's efforts to impeach Dranow in this manner were in fact attempts to inject highly inflammatory material into the case prejudicial to all the defendants. The courts have consistently held that the harm thus created cannot be undone by instructions from the trial court. *United States* v. *Clarke,* 343 F.2d 90 (3d Cir. 1965); *Scott* v. *United States,* 263 F.2d 398 (5th Cir. 1959); *Holt* v. *United States,* 94 F. 2d 90 (10th Cir. 1937).

In this circuit, in *United States* v. *Haupt,* 136 F.2d 661 (7th Cir. 1943), statements tending to incriminate not only the defendants who made them but also other defendants were admitted only against the defendants who made them, under instructions from the court. We held there that such efforts to limit the evidence to the individual declarants were ineffectual and that the trial court erred in denying the various defendants' motions for a severance. We stated:

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[9] That the letters may have had a deep impact on the jurors is evidenced by the fact that the juror who eventually became the foreman showed alternate juror Pare a newspaper account of the events surrounding the efforts to introduce the letters into evidence.

> A reading of these statements, however, leaves no room for doubt but that they were damaging not only as to the defendants against whom offered but as to all others. We doubt if it was within the realm of possibility for this jury to limit its consideration of the damaging effect of such statements merely to the defendant against whom they were admitted. We have equal doubt that any jury, or for that matter any court, could perform such a herculean feat . . . . .
>
> We are unaware of any procedure which the trial court could have devised, other than a severance, by which these incriminating statements could have been introduced against the defendants making them, without seriously prejudicing the rights of other defendants. *Id.* at 672.

The defendants' motions for severance from Dranow should have been granted.

3. COMMUNICATION WITH THE JURY IN THE ABSENCE OF THE DEFENDANTS

Another trial error concerns a communication by the judge with the jury in the absence of the defendants and their counsel, after the jury had retired to deliberate upon its verdicts.

During the discussion over requested instructions between the district judge and counsel, the judge indicated that he proposed to read the indictment to the jury, but that he did not intend to send a copy of it to the jury room. The defendants did not object to a reading of the indictment, but suggested that certain portions upon which evidence had not been offered be omitted. The judge nevertheless indicated that he intended to read the entire indictment. During his charge, however, he did not read the entire indictment; he omitted certain of the portions to which the defendants had voiced objection and also omitted the allega-

tions contained in seven counts, advising the jury that these counts had been dismissed.

After the jury returned its verdicts, defense counsel inquired whether the jury had a copy of the indictment in its possession during its deliberations. The judge informed them that the jury had in fact been given a copy. It was later disclosed through the testimony of the deputy marshal in charge of the jury that he had received a sealed communication from the jury during the course of its deliberations which he delivered to the judge. On one of the two pages in this note, the following appeared:

1 Document of all counts
2 " of law on all counts
3 " of overt acts named
Please return

The second page contained the signatures of each member of the jury. It was also disclosed that upon receiving this communication, the judge directed the deputy marshal to deliver the indictment to the jurors and to tell them that "they could have this and nothing more." Neither Government or defense counsel nor the defendants were notified of this request from the jury, nor were they informed of the judge's action in response to it, despite the fact that the judge had expressly stated that such notice would be given.[10]

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[10] The record discloses the following statement by the Judge after his charge to the jury:

> I request that all parties involved . . . leave with the Marshal your phone numbers at which you can be readily reached in case there is a verdict or in case there is some inquiry made by the jury, so that within an hour's time of the time a question is asked or a verdict is arrived at, we can all assemble here.
>
> Have your clients available if they desire to be here for the verdict or whatever question may be asked.

The action of the district judge in sending the indictment to the jury room without notifying counsel and in communicating with the jury through the deputy marshal out of the presence of the defendants and their counsel was a violation of the defendants' rights under the sixth amendment, as well as a violation of Rule 43 of the Federal Rules of Civil Procedure. The decisions in which conduct similar to that condoned by the majority has been condemned are legion. *E.g., Shields* v. *United States,* 273 U.S. 583 (1927); *Rice* v. *United States,* 356 F.2d 709 (8th Cir. 1966); *United States* v. *Neal,* 320 F.2d 533 (3d Cir. 1963); *Jones* v. *United States,* 308 F.2d 307 (D.C. Cir. 1962); *Evans* v. *United States,* 284 F.2d 393 (6th Cir. 1960); *Little* v. *United States,* 73 F.2d 861 (10th Cir. 1934).

A defendant's right to be present at all stages of a criminal trial includes the right to be present on those occasions when the judge communicates with the jury during its deliberations on any important matter. "Private communications, even though harmless in themselves, may open the way to abuses and may destroy confidence in legal procedure and the judiciary. Therefore, it is improper for the judge to hold any important communication with the jury concerning the case unless openly and with opportunity to the accused to be present and to object and to take exceptions." *Ray* v. *United States,* 114 F.2d 508 (8th Cir.), *cert. denied,* 311 U.S. 709 (1940).

The majority opinion dwells upon the assistance which the jury may have derived from the indictment in identifying the substantive charges against each defendant, and adverts to the unquestioned rule that a jury may be entitled to have the indictment during its deliberations, citing *United States* v. *Press,* 336 F.2d 1003 (2d Cir. 1964), *cert. denied,* 379 U.S. 965 (1965). These observations are irrelevant. The point which the majority fails to emphasize is

that the indictment was transmitted to the jury in response to a request which was ambiguous at best, and was accompanied by an oral communication through the marshal that no more information would be furnished—without notice to the defendants and their counsel and without an opportunity to be present to offer comments or objections. This was plain error.

Although the majority does not recognize the judge's action as error, it does acknowledge that it was "not good practice" for the judge "to have sent the brief message and the indictment" to the jury in the absence of the defendants and their counsel. The majority then concludes that the defendants were not prejudiced thereby. The fault with this conclusion is twofold. First, it is doubtful that a showing of prejudice was required, since the error committed was of constitutional proportions. *Shields* v. *United States, supra; Arrington* v. *Robertson,* 114 F.2d 821 (3d Cir. 1940). In any event, in all the decisions involving communications between court and jury in the absence of defendants, prejudice is strongly presumed and the burden is upon the Government to produce evidence showing that no prejudice resulted. *Rice* v. *United States, supra; Little* v. *United States, supra.* In *Walker* v. *United States,* 322 F.2d 434, 436 (D.C. Cir. 1963), cited by the majority, the court said that "we cannot let [the defendant's] conviction stand 'unless the record completely negatives any reasonable possibility of prejudice' to him arising from the judge's error." Second, here a "reasonable possibility" of prejudice to the defendants affirmatively appears in the record. For example, a portion of the indictment not read to the jury during the court's charge appears as follows:

> The action of the defendant, James R. Hoffa, in depositing funds of . . . Local 299 in the . . . [bank at] . . . Orlando, Florida, was being questioned by the court-

> appointed Board of Monitors for the International Brotherhood of Teamsters . . . in a judicial proceeding in the United States District Court for the District of Columbia . . . as a breach of his fiduciary duties.

Even Government counsel recognized that the jury should not be informed of this and other allegations in the indictment upon which no evidence was offered.[11] Yet, the indictment sent to the jury was unexpurged. More importantly, the jury's note was subject to interpretation as requesting something other than, or in addition to, the indictment. The communication itself indicated that the jury may have been confused and uncertain. In these circumstances, this court should not speculate that no prejudice to the defendants resulted when further inquiry on the part of the jury was immediately foreclosed by the judge through an oral communication by the marshal in the absence of the defendants and their counsel.

II.

The indictment in this case was hinged upon the mail and wire fraud statutes, 18 U.S.C. §§ 1341, 1343, which generally proscribe the use of various communications media in the furtherance of schemes to defraud or to obtain money by fraudulent representations. Each of twenty-seven substantive counts contained identical allegations charging the devising and execution of a single, all-inclusive scheme to defraud the Teamsters' Pension Fund, differing only in the particular interstate transmission alleged to be in fur-

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[11] During the conference on instructions, the prosecutor, in reply to the Judge's inquiry whether the Government had excluded any reference to the counts which had been dismissed from its proposed jury instructions, stated:

> Yes, I did, your Honor. I thought we ought to in fairness to the defendants. I also left out the material with reference to the monitor's proceedings which was excluded by your Honor—

therance of the scheme. The final count charged a single conspiracy among all the defendants to use the communications media in the execution of the overall scheme which they were alleged to have jointly devised.

The indictment contained allegations of certain background facts preliminary to outlining the alleged scheme. As the central part of this background, it was alleged that in 1955 Hoffa obtained a secret financial interest in Sun Valley, Inc., a Florida corporation engaged in the sale of real estate, and that he also placed $400,000 belonging to the Detroit Teamster Local 299 in the Florida National Bank at Orlando as collateral to secure a loan granted by the bank in that amount to Sun Valley; that Sun Valley thereafter met with financial difficulties and was unable to repay the loan and that the bank therefore refused to release the funds held as security. It was alleged that Dranow formed Union Land and Home Company, Inc. in September 1958 to acquire and succeed Sun Valley, which was then under the process of reorganization under the bankruptcy laws; that Burris, Dranow, and Weinblatt, at Hoffa's direction and for his benefit, undertook to acquire Sun Valley, to pay its debts and the reorganization costs, and thereby to secure the release of Local 299's funds from the bank.

The scheme to defraud the Teamsters' Pension Fund was alleged to have been devised sometime prior to July 2, 1958 by all the defendants. It was allegedly designed to defraud the Fund by the obtainment of loans through false representations. The various roles which each of the defendants was alleged to have played in the fraudulent securement of these loans can be stated in general terms. Dranow, Burris, Kovens, and Weinblatt were alleged to have cooperated in seeking out loan applicants and assist-

ing them in preparing materially false applications to the Fund. Strate and Hyman were alleged to have been among those who submitted such applications. Hoffa was alleged to have used his position as a trustee of the Pension Fund to further misrepresent the facts and thereby influence approval of the loans. The indictment alleged that by virtue of this scheme the defendants diverted more than one million dollars from the proceeds of loans from the Pension Fund to themselves in the form of fees, contracts for services, and control of borrowing corporations, and that more than one hundred thousand dollars of the funds so diverted was used to rehabilitate Sun Valley.

The loans which were alleged to have been included in the scheme devised by the defendants were listed in the indictment. These loans, totalling more than twenty million dollars, included loans:

1) To remodel the New Everglades Hotel, Miami, Florida;

2) To refinance and enlarge the Fountainebleau Motor Hotel, New Orleans, Louisiana;

3) To finance construction of a shopping center, renovation of apartment buildings, acquisition of real property, and payment of mortgages by the Key West Foundation Company, Key West, Florida;

4) To finance the purchase by Casa Marina Hotel Corporation of the Casa Marina Hotel, Key West, Florida;

5) To finance the purchase by La Concha Hotel Corporation of the LaConcha Hotel, Key West, Florida;

6) To obtain permanent financing for Four-Three-O-Six Duncan Corporation, Saint Louis, Missouri;

7) To finance the purchase by First Berkeley Corporation of buildings known as Connell Buildings and Cornell Buildings, and a leasehold interest in the Beverly Wilshire Health Club, located in the vicinity of Los Angeles, California;

8) To pay off obligations and make improvements to the Cornell Buildings operated by First Berkeley Corporation in Los Angeles, California;

9) To refinance mortgages on the Miracle Plaza Shopping Center, Vero Beach, Florida;

10) To construct North Miami General Hospital, North Miami, Florida;

11) To provide financing for the Miami International Airport Hotel, Miami, Florida;

12) To provide financing for the Birmingham Airport, Birmingham, Alabama;

13) To construct and improve the Causeway Inn, Tampa, Florida;

14) To refinance mortgages and other obligations of Club 300, Upper Saddle River, New Jersey.

From this brief outline of the charges against the defendants, a number of observations become pertinent. In an indictment such as the present one, for all practical purposes there is no difference between the substantive charge of devising and executing a scheme to defraud and the charge of conspiring to commit the substantive offense that is, unlawfully agreeing to devise and execute the scheme. "A scheme to use the mails to defraud, which is joined in by more than one person, is a conspiracy." *Pinkerton* v. *United States,* 328 U.S. 640, 647 (1946); *Cochran* v. *United States,* 41 F.2d 193, 199 (8th Cir. 1930).

The Government's theory of the indictment and the evidence demonstrates this fact. The scheme to defraud was attempted to be shown as an unlawful joint enterprise by the defendants, that is, a conspiracy. Thus, but for the fact that the law permits separate substantive mail and wire fraud counts to be based upon individual communications, the scheme and the conspiracy merged insofar as the evidence related to the proof of them.

Another characteristic of the indictment is its preoccupation with the financial well-being of Sun Valley. In the Government's efforts to charge and prove a single scheme or conspiracy among all the defendants, Sun Valley became the unifying element. The majority opinion explicitly recognizes that, at least under the Government's theory of the case, the extrication of Sun Valley from its financial difficulties, for Hoffa's benefit, was the common object of the alleged scheme to defraud the Pension Fund. Such a cohesive force among the defendants was necessary to avoid the objection that multiple schemes or conspiracies encompassing fewer than all of the defendants were involved. The existence of multiple conspiracies would have necessitated separate trials to avoid a fatal variance in the proof similar to that occurring in *Kotteakos* v. *United States*, 328 U.S. 750 (1946).

The difficulty in placing Sun Valley in a position of prominence as the central physical objective of the alleged scheme is nevertheless visible in the indictment. The defendants were alleged to have diverted over one million dollars to themselves, yet only one hundred thousand dollars was alleged to have "trickled down" to Sun Valley, a relatively insignificant amount which could have been supplied from any one of several "finders fees" paid by various recipients of loans from the Pension Fund. As the

defendant Kovens suggests, had the charge been merely that the defendants devised a scheme to enrich themselves at the expense of the Pension Fund, the task of binding them together would have been manifestly more difficult. It is also significant to note that the last recorded activity in discharging the Sun Valley indebtedness occurred in June 1960 and that the $400,000 belonging to Teamsters Local 299 was released by the Florida National Bank at Orlando on June 27, 1960.

If the Sun Valley situation was in fact the tying element in this case, then its position calls for an obvious, but seemingly overlooked, clarification. The defendants were not on trial for effecting the reorganization of Sun Valley. The rehabilitation of Sun Valley, or, to use the Government's epithet, the Sun Valley "bail out," was not illegal per se. The fact that Hoffa may have had a "secret" interest in Sun Valley or that his actions with respect to it may have been in violation of some duty owed by him to the members of Teamsters' Local 299 had nothing whatever to do with the crime charged in the indictment. The legitimate reason for the inclusion of the Sun Valley and Union Land and Home Company operations in the indictment and the submission of evidence in respect to them was to show how these operations may have furnished a motive for, or been the object of, a scheme to obtain loans from the Pension Fund through false and fraudulent representations. Therefore, the Government's repeated inferences, both during the trial and in this appeal, that Sun Valley could only be associated with skullduggery and other varieties of evil-doing are largely beside the point. If rescuing Sun Valley was an "end," then for the purposes of this case it could have been no more than the lawful object of a conspiracy to achieve a lawful end by unlawful means.

A similar observation should be made with respect to the aura of criminality cast about the payment of fees ("pay offs") and other "diversions" from loan proceeds as such.[12] The payment of a fee to one who insists in the procurement of a loan, whatever else it may be, is not of itself a fraud upon the lender. Nor are "diversions" fraudulent standing alone, as the trial court recognized in its instructions to the jury, if not in the reception of evidence.

The gist of the crime charged in this case resides in the allegations and evidence submitted in respect to false and fraudulent representations made to the Pension Fund by the defendants. Unless this essential element of the crime was proved, the alleged diversions of money to Sun Valley, although necessary to bind the defendants together, were meaningless. Thus it was incumbent upon the Government to prove that loans were obtained from the Pension Fund through material misrepresentations by the defendants, and also to prove that the defendants had joined together to do precisely this sort of thing for some reason common to all of them. This common object, the Government says, was Sun Valley.

With these premises in mind, an analysis of the evidence reveals a fatal variance from the crimes charged in the indictment, prejudicial to the defendants Strate, Hyman, and Kovens, and a great mass of evidence which was wholly irrelevant to the crimes there charged, prejudicial to all the defendants.

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[12]As an example of the climate which was created in connection with Sun Valley and the payment of fees, the Government asserts that knowing participation in the conspiracy is shown by the awareness on the part of certain defendants that the "price" of getting Pension Fund loans was to make money available to rehabilitate Sun Valley. While such conduct may be morally reprehensible, it does not amount to a fraud upon the Pension Fund, the crime charged in the indictment, absent some misrepresentation to the Fund.

4. VARIANCE IN THE PROOF

The evidence, viewed in the light most favorable to the Government, does not disclose a single scheme to defraud the Pension Fund through misrepresentations in order to rescue Sun Valley from financial ruin. Instead, the resume of the evidence which follows tends to show several smaller and distinct schemes, involving different combinations of the defendants and with two or three defendants common to all the schemes, each designed to effect the personal enrichment of the particular members of the scheme. Yet all the evidence relating to all of the loan transactions alleged in the indictment was admitted against all the defendants.

(a) *The Everglades Hotel Loans*

Two loans were made by the Pension Fund to Vaughn B. Connelly[13] to finance the renovation of the Everglades Hotel, Miami, Florida. The first loan, $3,300,000 was obtained in January 1959. Kovens was the building contractor. He brought Dranow and Burris into the loan negotiations. Burris helped to prepare the application. Later, Hoffa joined the discussion relating to this application. The evidence shows that Connelly made payments to Dranow totalling $300,000 in connection with this loan, under suspicious circumstances which the majority opinion has pointed out. The evidence also shows that Connelly paid $15,000 to Hyman Greenberg, Dranow's brother-in-law, which found its way into Union Land and Home Company to assist in the rehabilitation of Sun Valley. This money, however, was not shown to have come from the Pension Fund loan. Further, no misrepresentations to

[13] Connelly, the principal Government witness, was not named as a co-conspirator, although his position appears to differ from that of defendants Strate and Hyman only in degree.

the Pension Fund in connection with this loan were proved, and the indictment did not include a substantive charge based upon any mailings relating to it. Strate and Hyman nowhere appear in connection with this loan.

The second Everglades loan, for $1,000,000, was secured by Connelly in July 1959. Burris and Dranow assisted in the preparation of the loan application, and Hoffa was influential in obtaining its approval. No direct misrepresentions appear to have been made in this application, but the evidence does show that at the time the loan was paid out, an inspection, an appraisal, and the execution of a mortgage as a part of the security for the loan had not taken place, and Connelly had not yet paid a required $5,000 "service charge" to the Fund. Assuming that these latter items amounted to material misrepresentations to the Pension Fund, the evidence failed to connect Strate and Hyman with the second Everglades loan, and Kovens can only be connected by inference from his association as the contractor on the hotel. Nor was there any showing that any money from this loan was diverted to Sun Valley.[14]

(b) *The Pelican-Fountainebleau Loans*

The Government introduced evidence of four loans made by the Pension Fund to the Pelican State Hotel Corporation, partly owned by the defendant Strate, to refinance and enlarge the Fountainebleau Hotel in New Orleans. These were the only loans with which Strate had any

[14] The mailing alleged in the first count of the indictment related to this loan. All the defendants were found guilty on this count, the only loan transaction as to which defendants who did not directly participate were accorded joint substantive responsibility.

connection. The dates and amounts of these loans are as follows:

1.	July 1959	$1,350,000
2.	February 1960	2,325,000
3.	December 1960	500,000
4.	March 1961	500,000

The evidence shows that Dranow and Burris assisted Strate with his applications for these loans and that Hoffa was aware of their efforts and was again instrumental in securing the approval of some of the loans. The evidence also shows the payment of substantial fees and the granting of other concessions by Strate to Dranow and Burris in connection with at least the first two loans. It further shows several misrepresentations made to the Pension Fund with respect to the applications for the second and third loans.[15] Finally, the evidence reveals that Strate diverted substantial portions of the loan proceeds to his own benefit and that he "came up with" $50,000 for the Sun Valley enterprise. The third and fourth loans, however, were granted after the rehabilitation of Sun Valley had taken place. Further, the evidence failed to disclose that either Hyman or Kovens had any connection with, or knowledge of the Fontainebleau loans. The majority opinion states that "representatives of Strate contacted Kovens who referred them to Dranow," as an indication of complicity on the part of Kovens. The evidence shows only that an attorney friend of Strate's, Cohen, and a Miami restaurant owner, Elliott, contacted Kovens and unsuccess-

[15] Strate was convicted on the substantive counts alleging mailings relating to the first three loans. Hoffa was found guilty on the count relating to the second loan. The remaining defendants were acquitted on all the counts pertaining to the Fountainebleau loans.

fully attempted to interest him in financing the Fountainebleau. Later Kovens introduced Elliott to Dranow. Dranow thereafter contacted Strate in New Orleans.

(c) *The Key West Foundation Loans*

The Pension Fund granted two loans to the Key West Foundation Company, which owned apartment buildings in Key West, Florida. The defendant Hyman and his wife held fifty per cent of the stock in Key West. The first loan, in the amount of $875,000, was obtained in July 1959 through the combined efforts of Hyman and Burris. The evidence indicates that Hyman "invested" $100,000 of the proceeds of this loan in the Union Land and Home Company (Sun Valley) at the suggestion of Burris. No misrepresentations to the Pension Fund were proved as to this loan and the district court dismissed the count in the indictment which recited a mailing relating to it.[16]

A second loan of $400,000 was granted to Key West in June 1960 to remodel the Poinciana Apartments. The evidence supports the charge that both Hyman and Hoffa made certain misrepresentations to the Pension Fund in regard to the loan application. Hyman's false statements were flagrant, relating principally to periodic proofs of expenditures which were required to be submitted to the Fund before disbursements could be made on the loans. Hoffa's misstatements were of a relatively minor nature and occurred while he was arguing in favor of the loan to the trustees of the Fund. They conveyed a false impression that business conditions in Key West were on the

[16] The indictment charged that the Hymans misrepresented that they were the sole owners of Key West stock when in fact they owned only 50%. The trial court held this to be an immaterial misrepresentation following the testimony of a Pension Fund official to the same effect.

upgrade. The proceeds of the second Key West loan were not disbursed by the Pension Fund until the rehabilitation of Sun Valley was an accomplished fact; therefore, no such diversion was proved. Further, neither Kovens nor Strate was shown to have even known about the loans to Key West.[17]

(d) *The La Concha and Casa Marina Hotel Loans*

Late in 1961 Hyman applied to the Pension Fund for loans totalling $650,000 to finance the purchase of the La Concha and Casa Marina Hotels, Key West, Florida. The loans were approved in January 1962 on Hoffa's motion. As a condition for the disbursement of $217,000 of the loan proceeds, the Pension Fund required that satisfactory leases of the hotels to a responsible person be executed. Hyman leased the hotels to Charles Lavin, an operator of retirement hotels who had been working for him at a salary of $100 per week for several months, apparently assisting in the establishment of a retirement plan at the hotels. The balance of the loan proceeds were disbursed in March 1962, but Hyman fired Lavin and the hotels were never operated under the leases.

No diversions from loan proceeds were shown and the loans were disbursed long after Sun Valley had been rehabilitated. The other defendants were not connected to the La Concha-Casa Marina transactions, except that Burris was present with Hyman when the appraiser for the Fund inspected the properties.[18]

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[17] Hyman was found guilty on four counts relating to the second loan. All other defendants were acquitted on these counts.

[18] Hyman was convicted on two counts relating to the loans. All other defendants were acquitted on these counts.

(e) *The First Berkeley Loans*

The Pension Fund made three loans to the First Berkeley Corporation, a real estate corporation in which Burris was the sole stockholder of record.

A loan of $266,000 was granted in January 1960 to acquire the Beverly-Wilshire Health Club near Los Angeles. The Government conceded at the trial that no misrepresentations were made in connection with this loan. The second loan to First Berkeley, for $2,966,000, was granted in March 1960 to acquire the Cornell Buildings in Los Angeles. Burris made several misrepresentations in the loan application concerning First Berkeley's collateral and financial condition which might have been material considerations in the granting of the second loan, although certain of the misstatements cited by the Government are of questionable significance. The evidence is perhaps sufficient to connect Hoffa and Dranow with this loan by their knowledge of Burris' activities.[19] The evidence, however, failed to establish that any of the loan proceeds went into the Sun Valley rescue operation.

A third loan of $300,000 was granted by the Pension Fund to First Berkeley in April 1961 for improvements in the Cornell Buildings. No misrepresentations concerning this loan were proved. The loan itself was disbursed after Sun Valley had been financially restored. The Government attempted, however, to show some connection between a portion of the loan proceeds and Sun Valley by introducing evidence of a series of complicated transactions involving an earlier loan of $125,000 by John Factor

[19] Hoffa was convicted on the substantive count alleging a mailing in connection with the second loan. All other defendants were acquitted on this count.

to Irving Link and Murray Randolph. The Government sought to trace the proceeds of this loan through First Berkeley to Dranow and thence to Sun Valley. Finally, it attempted to show that $55,000 from the third First Berkeley loan was indirectly used to repay the Factor loan. The district court ruled that the Government failed to do so, and dismissed the two counts alleging mailings relating to this loan. The court, however, did not strike the evidence.

Neither Hyman, Strate, nor Kovens was connected with any of the loans to First Berkeley.[20]

(f) *The Good Samaritan Loans*

The Government introduced evidence concerning two loans by the Pension Fund to Good Samaritan Hospital, Inc. to finance the construction of the North Miami General Hospital. Burt Sager, a Miami attorney, was the original promoter of the hospital and the organizer of Good Samaritan Hospital, Inc. Sager contacted Kovens in the summer of 1959 and inquired into the possibility of constructing a hospital on property held by Ruedd, Inc., a corporation owned by Kovens. Following several discussions, Sager decided to apply for a loan from the Pension Fund and was introduced to Burris. Burris assisted Sager's accountant in preparing an application for a loan of $2,300,000. A loan in this amount was first approved by the Fund in September 1959, but no disbursements of loan proceeds were made until late in 1960.

The indictment alleged several misrepresentations with respect to this loan, not in connection with the application itself, but generally relating to conditions placed

[20] Kovens did permit Burris to pledge his stock in Ruedd, Inc. as collateral in obtaining the second loan.

upon the disbursement of loan proceeds by the Pension Fund. The evidence as to the materiality of these misrepresentations is equivocal at best.[21] But assuming the materiality of one or more of them by Kovens (concerning his bond as the contractor on the project) and by Hoffa (relating to funds which were to have been made available by investors in the hospital), none of the proceeds of the loan were shown to have been diverted for any purpose, including Sun Valley.[22] Kovens got a fee of $200,000 for constructing the hospital, but the reasonableness of his contracting fee was not called into question. The evidence also supports the inference that Kovens contributed $28,000 to assist in the reorganization of Sun Valley. His contribution, however, was not connected to the Pension Fund in any way; in fact, the payment was made before the proceeds of the first Good Samaritan loan were disbursed.

The Pension Fund granted a second loan of $500,000 to Good Samaritan in June 1961 to finance an increase in the size of the hospital. A single immaterial misrepresentation relating to this loan was proved. Eight days after the second loan was approved, during a discussion of an unrelated loan application submitted by Kovens,

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[21] For example, Hoffa was shown to have represented to the Fund that Dade County, Florida was going to lease and operate the hospital and was investing as much money in it as the Pension Fund. The representations were false. They were made, however, not in connection with the application for the loan, but during a discussion concerning the reduction in the interest rate on the loan from 6½% to 6¼%.

[22] The Government expressly conceded its failure to prove an allegation in the indictment that "a substantial portion of this money had been diverted for other purposes."

Hoffa told the Fund trustees that the second loan had been expended in adding another floor to the hospital, when in fact no additional floor had been constructed. The Sun Valley indebtedness had been extinguished before the loan was granted.

Finally, neither Strate nor Hyman had any connection with either of the Good Samaritan loans.[23]

(g) *The 4306 Duncan Corporation Loan*

Fred Strecker, a Pension Fund trustee, sought a Pension Fund loan to refinance property in St. Louis which he had purchased and which he held as the 4306 Duncan Corporation. Hoffa referred Strecker to Burris, who agreed to assist in securing the loan if Strecker would retain Burris' accounting firm for his business. Burris then took Strecker to Miami where they discussed the loan application with Dranow.

Later Burris contacted Max Federbush, an acquaintance, suggested that Federbush purchase the 4306 Duncan property, and told him that he could obtain a loan from the Pension Fund to finance the purchase. Federbush had few resources of his own, but agreed to the proposition and signed without reading a number of papers put before him by Burris. Included in these documents was an application for a Pension Fund loan to 4306 Duncan Corporation, listing Federbush as its president. Burns then brought Strecker and Federbush together and obtained a loan of $15,000 for Federbush to give Strecker as a "down payment" on the property.

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[23] Burris, Dranow, Kovens, and Hoffa were found guilty of certain of the counts relating to the Good Samaritan loans. The other defendants were acquitted on these counts.

Some time later, but before the Pension Fund considered the 4306 Duncan application, Burris told Federbush that his loan application had been rejected because of Federbush's prior criminal record and arranged for the return of "his" money (Weinblatt deposited $15,000 in Federbush's bank account.)

Strecker attended the Pension Fund meeting at which the loan application was considered. Before the meeting began, Dranow and Burris told him that the application was being presented in the name of a "straw party," Federbush. Strecker testified that, within the hearing of several of the trustees, he told Hoffa that he objected to the loan application being presented in this manner, and that Hoffa replied, "Do you want the loan or not?" The loan was approved on Hoffa's motion and 4306 Duncan Corporation subsequently received $840,000. De spite the procurement of this loan from the Fund through the connivance of Dranow, Burris, and Hoffa, no diversions or fee payments were proved and Sun Valley was nowhere mentioned or considered. Kovens, Strate, and Hyman were not connected with this transaction in any way.[24]

The preceding analysis relating to several of the loan transactions charged to be part of a single conspiracy demonstrates that no common design bound all of the defendants together. This case is therefore governed by *Kotteakos* v. *United States,* 328 U.S. 750 (1946).

In *Kotteakos,* thirty-two persons[25] were charged with

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[24] The indictment did not contain a substantive mail fraud count relating to this loan, but three overt acts pertaining to it were included in the conspiracy count.

[25] Nineteen persons were tried. The cases of thirteen were submitted to the jury. Seven were convicted.

a single conspiracy to violate the National Housing Act by inducing financial institutions to grant loans which would then be offered to the Federal Housing Administration for insurance upon applications containing fraudulent information. The evidence, however, proved at least eight different conspiracies to obtain fraudulent loans by separate groups of defendants which had no connection with each other except that the principal defendant acted as a broker to handle the fraudulent applications in all of them. The Supreme Court held that it was reversible error to try all the defendants "*en masse* for the conglomeration of distinct and separate offenses committed by others." *Id.* at 775. The Court stated:

> The trial court was of the view that one conspiracy was made out by showing that each defendant was linked to Brown in one or more transactions, and that it was possible on the evidence for the jury to conclude that all were in a common adventure because of this fact and the similarity of purpose presented in the various applications for loans.
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> This view, specifically embodied throughout the instructions, obviously confuses the common purpose of a single enterprise with the several, though similar, purposes of numerous separate adventures of like character.
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> * * *
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> When many conspire, they invite mass trial by their conduct. Even so, the proceedings are exceptional to our tradition and call for use of every safeguard to individualize each defendant in his relation to the mass. Wholly different is it with those who join together with only a few, though many others may be doing the same and though some of them may line up with more than one group.
>
> Criminal they may be, but is not the criminality of mass conspiracy. They do not invite mass trial by their conduct. *Id.* at 768-69, 773.

Thus in *Kotteakos,* as here, the vice lay in the fact that the prosecution was allowed to proceed on the theory that a generic description of the substantive crime which the defendants were alleged to have conspired to commit was a sufficient common objective so as to make each defendant a codefendant with the others named in the indictment.

Hoffa, Dranow, and Burris were common actors in the majority of those loans in which evidence of fraudulent representations was present. Therefore, as to them, the joinder of multiple subsidiary conspiracies could not have been prejudicial. *Kotteakos* v. *United States, supra.* But the participation of Strate and Hyman in only those loans in which they were interested as borrowers and the participation of Kovens in only those loans in which he stood to acquire contracts for services clearly indicate that they were seriously prejudiced by their joinder with each other and with the other defendants for a "conglomeration of distinct and separate offenses."

The evidence as to the defendant Weinblatt was wholly insufficient to find him criminally responsible with respect to any of the loan transactions.

5. Irrelevant and Prejudicial Evidence

It is apparent from the foregoing discussion that a great amount of irrelevant, immaterial evidence was admitted against the defendants Similar evidence was introduced relating to a number of loans which have not yet been examined. In fact, a substantial number of the loan transactions as to which evidence was offered and received had no logical tendency to prove either the existence or the execution of the scheme to defraud the Pension Fund charged in the indictment, or for that

matter, any scheme to defraud the Pension Fund. Loans as to which no evidence of fraud was produced and which had no relation to Sun Valley were irrelevant for any purpose. Evidence with respect to these loans had a prejudicial effect against the defendants not only because of its volume and complexity, but also because it emphasized the mere association of the defendants with each other and with the Pension Fund; moreover, it tended to emphasize the payment of fees and the obtaining of advantages by various defendants even though the Pension Fund was in no way defrauded or harmed. Loans evidencing no fraud but having some relationship with Sun Valley were prejudicial for the same reasons, and even more so, because they amounted to an invitation to the jury to find a conspiracy inherent in the mere association of persons pursuing a lawful venture.

(a) *The Miracle Plaza Loan*

In June 1960 a Pension Fund Loan for $1,100,000 was granted to refinance mortgages on the Miracle Plaza shopping center, Vero Beach, Florida. One of the counts in the indictment alleged the mailing of a letter by a Miami attorney representing the borrower in connection with the loan. It was shown that Kovens was associated in the venture. The mailing was proved, but the Government dismissed the count prior to the submission of the case to the jury. The evidence, however, was not stricken. No facts were introduced suggesting any fraud in connection with the loan or showing that the transaction was in any way linked to Sun Valley.

The Government argues in its brief that "the Miracle Plaza loans were tied to the scheme because Dranow, in promoting the First Berkeley and Fountainebleau deals, repeatedly pointed out this Kovens shopping center, which

had been built with Pension Fund money, as one of his Pension Fund triumphs. On the third of these occasions, Strate and Burris were present when Dranow showed off the shopping center." It is difficult to comprehend how this observation, if correct, would "tie" Miracle Plaza to the scheme charged in the indictment and justify the submission of evidence in respect to it But the observation is not even supported by the record, which indicates that the shopping center referred to by Dranow was located in Miami Beach, and not in Vero Beach, Florida, where Miracle Plaza was located.

(b) *The Miami International Airport Hotel and the Birmingham Airport Motel Loans*

The indictment alleged and evidence was introduced concerning two Pension Fund loans to corporations in which George M. Simon, a Miami accountant, was interested. In 1959 a $2,000,000 loan was granted to Airway Hotel, Inc. to finance the construction of the Miami International Airport Hotel. In 1961 an additional loan of $1,000,000 was granted to finance the Birmingham Airport Motel, Birmingham, Alabama. Simon obtained the loans with Burris' assistance. Burris charged two per cent brokerage fees, totaling $85,000, for his efforts. No misrepresentations with respect to these loans were proved, nor was Sun Valley ever mentioned in connection with them.

Again referring to the Government's brief, the Government argues, "The 'airport hotel' loans were relevant, not only because they also revealed the usual arrangement of Burris procuring Pension Fund loans for a fee, but also because the loans were obtained for accountant George Simon who, at about the same time (March 1960), participated in the preparation of the fraudulent loan application filed by First Berkeley with the Pension Fund." (Si-

mon prepared a balance sheet for First Berkeley Corporation from information furnished by Burris.) That Burris charged a two per cent fee, or that Simon had dealings with Burris was totally irrelevant.[26] These circumstances did not in any way tend to prove an unlawful agreement to rehabilitate Sun Valley by defrauding the Pension Fund.

(c) *The Club 300 Loan*

A loan of $900,000 was made by the Pension Fund in 1961 to Club 300, Inc., Upper Saddle River, New Jersey, to finance a motel and bowling alley. The loan was the subject of one of the mail fraud counts in the indictment and three of the overt acts in the conspiracy count. Although the mailing was proved, the Government dismissed the substantive count before the case was submitted to the jury; however, the evidence was not stricken. James Dioguardi, a contractor, first talked to Hoffa about a loan on undeveloped land in New Jersey. Hoffa suggested that Dioguardi contact Burris. Later, Dioguardi consulted Burris regarding a loan for the Club 300. Dioguardi and the defendant Burris' son Herbert,[27] split a five per cent fee from the borrower for preparing the application. There was no evidence of any misrepresentations to the Pension Fund in connection with the loan and all discussions about fees occurred long after Sun Valley had been rehabilitated.

As to the relevance of this loan, the Government states, "The Dioguardi-Club 300 transaction was further evidence of the general pattern of the conspiracy to place fraudulent Pension Fund loans, since it showed that, when Dioguardi told Hoffa in 1961 that he wanted a loan, Hoffa re-

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[26] Simon was neither indicted nor named as a co-conspirator.

[27] Herbert Burris, named as a defendant in the indictment, was acquitted at the close of the Government's case-in-chief. Dioguardi was neither indicted nor named as a co-conspirator.

ferred him to Burris." Such a "referral" does not justify the admission into evidence of all the facts concerning the application for, and the granting of, an otherwise unassailable loan. Nor was it evidence of a "pattern" of placing "fraudulent" loans.

(d) *The Causeway Inn Loans*

Pension Fund loans of $1,500,000 and $350,000 were granted to Causeway Enterprises, Inc. to construct the Causeway Inn, Tampa, Florida. The first loan was approved in October 1960 and the second a few months later. The district court directed a verdict of acquittal on the count in the indictment relating to these loans, but the evidence was not stricken.

Irving Kipnis promoted the Causeway Inn venture.[28] His first application for a Pension Fund loan was rejected. Later, he met Burris, who agreed to help secure the loan for a fee. While the application was pending, Burris told Kipnis that he needed some money for Sun Valley immediately and asked him to buy a ten per cent interest in it. Kipnis gave Burris a check for $57,000, allegedly for an "option-loan" interest in Sun Valley, the principal condition being that the money be refunded if the option was not exercised within three years. The check was given to Dranow, who used it to rehabilitate Sun Valley. Burris later received checks from the borrower for $57,000 and $58,000 as fees for his part in securing the loans. In turn, Burris gave Kipnis a check for $57,000 in cancellation of the "option-loan" agreement.

Evidence was introduced to show that Kovens became the contractor on the Causeway Inn, but it showed only that Kipnis' son and son-in-law made the contracting arrangements with Kovens after the first loan was granted.

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[28] Kipnis was neither indicted nor named as a co-conspirator.

The Government also introduced evidence of a third loan to Causeway Inn, Inc. In January 1963 Kipnis appeared before the Pension Fund and requested a $1,000,000 loan to be used for the expansion of the Causeway operation through the purchase of an adjacent motel. He also requested that payments on the other loans be suspended for eighteen months because the Causeway Inn was losing money. Upon Hoffa's motion, these requests were granted by the trustees.

Thus, despite the fact that the first Causeway Inn transaction was shown to have had some relationship with the attempt to rescue Sun Valley, no evidence of fraud with respect to any of the Causeway loans was produced. The Government says that the loans were relevant because they were "tied to Sun Valley," because "Kovens got the Causeway construction contract," and because "Dranow and Burris got fees."

The Government's argument illustrates the fundamental error in the admission of much of the irrelevant evidence introduced in this case. The argument assumes that any connection on the part of any of the defendants with each other or with the Pension Fund, however, innocent or remote from Sun Valley, was admissible against all the defendants to prove the scheme and conspiracy charged in the indictment. The flaw in such an assumption resides in the notion that a conspiracy is a group of people rather than an act of agreement upon a common objective *United States* v. *Borelli*, 336 F.2d 376, 384 (2d Cir. 1964). The court in *Borelli* noted with misgiving the tendency to treat conspiracy cases in this manner. Such a practice creates problems of the kind to which Mr. Justice Jackson referred in *Krulewitch* v. *United States*, 336 U.S. 440, 453 (1949) (concurring opinion), when he stated:

> When the trial starts, the accused feels the full impact of the conspiracy strategy. Strictly, the prosecution should first establish *prima facie* the conspiracy and identify the conspirators, after which evidence of acts and declarations of each in the course of its execution are admissible against all. But the order of proof of so sprawling a charge is difficult for a judge to control. As a practical matter, the accused often is confronted with the hodgepodge of acts and statements by others which he may never have authorized or intended or even known about, but which help to persuade the jury of existence of the conspiracy itself. In other words, a conspiracy often is proved by evidence that is admissible only upon assumption that conspiracy existed.

The defendants in this case were faced with similar problems.

Apropos also is Mr. Justice Jackson's observation that "there generally will be evidence of wrongdoing by somebody." *Id.* at 454. Indeed it can be said that the evidence here indicates that each defendant was guilty of some kind of wrongdoing But a conviction should not stand if there is a substantial variance between the charge and the proof or if it is based even in part upon immaterial, prejudicial evidence.

In summary, the convictions in this case should be set aside for different reasons, as to the defendants Hyman, Kovens, and Strate because of the variance in the proof, as to the defendant Weinblatt because of the insufficiency of the evidence, and as to the defendants Hoffa, Dranow, and Burris because of reversible trial errors. With regret and reluctance, I am impelled also to say that an intense study of the record convinces me that this prosecution was designed to charge a sprawling, amorphous scheme and conspiracy, in order to allow the presentation of a series of confusing, complex transactions and to abet the introduction of a mass of immaterial, prejudicial evidence. If a

person is to be prosecuted and punished for his misdeeds, he should be charged with a specific crime and convicted by proper evidence. Moreover, every defendant in a criminal case is entitled to the fundamentals of a fair trial, free of the prejudicial errors that occurred in this case.

A true Copy:

Teste:

.....

Clerk of the United States of Appeals for the Seventh Circuit.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60610

Tuesday, October 4, 1966

Before

Hon. F. RYAN DUFFY, Senior Circuit Judge

Hon. LATHAM CASTLE, Circuit Judge

Hon. LUTHER M. SWYGERT, Circuit Judge

No. 14892, 93, 94, 95, 96, 97, 98

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

JAMES R. HOFFA, BENJAMIN DRANOW, ZACHARY A. STRATE, JR., S. GEORGE BURRIS, ABE I. WEINBLATT, CALVIN KOVENS, and SAMUEL HYMAN, *Defendants-Appellants.*

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgments of conviction the said District Court in each of the appeals be, and the same are hereby, AFFIRMED, in accordance with the opinion of this Court filed this day

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

November 28, 1966

Before

Hon. JOHN S. HASTINGS, Chief Judge

Hon. F. RYAN DUFFY, Senior Circuit Judge

Hon. ELMER J. SCHNACKENBERG, Circuit Judge

Hon. WIN G. KNOCH, Circuit Judge

Hon. LATHAM CASTLE, Circuit Judge

Hon. ROGER J. KILEY, Circuit Judge

Hon. LUTHER M. SWYGERT, Circuit Judge

Hon. THOMAS E. FAIRCHILD, Circuit Judge

Hon. WALTER J. CUMMINGS, JR., Circuit Judge

Nos. 14892-14898

UNITED STATES OF AMERICA

v.

JAMES R. HOFFA, ET AL.,

On consideration of the petition of defendants-appellants, James R. Hoffa, et al., for a rehearing in the above appeals by the court sitting *en banc,* and the answer thereto by plaintiff-appellee, United States of America;

It Is Ordered, that the petition of defendants-appellants, James R. Hoffa, et al., for a rehearing of the instant appeals by the court sitting *en banc,* be and the same is hereby denied.

Circuit Judges Knoch and Swygert voted to grant such petition for a rehearing *en banc.*

APPENDIX D

APRIL 1967

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

HOFFA ET AL. *v.* UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 1003. Denied May 22, 1967.

PER CURIAM

Petitioners were convicted of various counts under a 28-count indictment charging mail and wire fraud, in violation of 18 U.S.C. §§ 1341, 1343, and conspiracy, in violation of 18 U.S.C. § 371. The United States claimed, and the jury apparently found, that petitioners conspired to defraud, and did defraud, the Central States, Southeast and Southwest Areas Pension Fund of the International Brotherhood of Teamsters, with the prime objective of financially rehabilitating Sun Valley, Inc., a real estate enterprise in which certain of the petitioners had important interests. For reasons which follow, we do not reach, one way or the other, any of the contentions urged by petitioners in support of their petition for a writ of certiorari.

In response to the petition, the Solicitor General *sua sponte* has advised the Court that on December 2, 1963, some six months after the indictment in this case, a conversation between petitioner Burris and one Benjamin Sigelbaum, not a defendant in this prosecution, was overheard by agents of the Federal Bureau of Investigation as a result of electronic eavesdropping. The eavesdropping equipment had been installed in Sigelbaum's office, by

trespass, some 12 months before this conversation, and thereafter had been maintained in operation. We are informed by the Solicitor General that the recorded conversation was concerned both with the proposed transfer to Sigelbaum of Burris' interest in Sun Valley, and with the conduct of the defense to this prosecution. The Solicitor General has indicated that the contents of the recording were available to government attorneys involved in this prosecution, but adds that the recording was only "peripherally relevant to the charges underlying [Burris'] conviction."* We are, moreover, advised by him that the information obtained through this electronic eavesdropping was not introduced into evidence at trial, that it was never the basis of any investigative lead, and that it was in part already known, through Burris' own statements, to government attorneys. Unlike the situations in *Black* v. *United States,* 385 U.S. 26, and *O'Brien* v. *United States,* ..... U.S. ....., there was apparently no direct intrusion here into attorney-client discussions. In these circumstances, we find no "adequate justification," *Black* v. *United States, supra,* at 29, now to require a new trial of Burris or of any of the other petitioners; the more orderly and appropriate procedure is instead to remand the case to the District Court for a hearing, findings, and conclusions on the nature and relevance to these convictions of the recorded conversation, and of any other conversations that may be shown to have been overheard through similar eavesdropping. *United States* v. *Shotwell Mfg. Co.,* 355 U.S. 233.

We do not accept the Solicitor General's suggestion that such an inquiry should be confined to the conviction of Burris. We consider it more appropriate that each of

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* Brief for the United States in Opposition 70.

these petitioners be provided an opportunity to establish, if he can, that the interception of this particular conversation, or of other conversations, vitiated in some manner his conviction. We do not intend by this to suggest that any or all of the petitioners might, under the circumstances described by the Solicitor General, be entitled to a new trial; we decide only that further proceedings must be held, and findings and conclusions made, to determine the content and pertinence to this case of any such recorded conversations.

Accordingly, we grant the petition for a writ of certiorari as to each of the petitioners, vacate the judgment of the Court of Appeals, and remand the case to the District Court for further proceedings. In such proceedings, the District Court will confine the evidence presented by both sides to that which is material to questions of the content of this and any other electronically eavesdropped conversations, and of the relevance of any such conversations to petitioners' subsequent convictions. The District Court will make such findings of fact on these questions as may be appropriate in light of the further evidence and of the entire existing record. If the District Court decides, on the basis of such findings, that the conviction of any of the petitioners was not tainted by the use of evidence thus improperly obtained, it will enter new final judgments as to such petitioners based on the existing record as supplemented by its further findings, thereby preserving to all affected parties the right to seek further appropriate appellate review. If, on the other hand, the District Court concludes after such further proceedings that the conviction of any of the petitioners was tainted, it would then become its duty to accord any such petitioner a new trial. See *United States* v. *Shotwell Mfg. Co., supra,* at 245-246; see also *Shotwell Mfg. Co.* v. *United States,* 371 U.S. 341.

The petition for a writ of certiorari is granted, the judgment of the Court of Appeals is vacated, and the case is remanded to the District Court for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE BLACK would grant certiorari and set the case for argument. He dissents from the vacation of the judgment of the Court of Appeals and from the remand of the case to the District Court.

MR. JUSTICE WHITE took no part in the consideration or decision of this case.

APPENDIX E

OPINION AND FINDINGS OF DISTRICT COURT ON REMAND

(Filed September 22, 1967)

Following a trial by jury, defendants were found guilty in August 1964 of conspiracy and mail and wire fraud and on appeal these convictions were affirmed. *United States* v. *Hoffa, et al.,* 367 F. 2d 698 (C.A. 7, 1966). Thereafter, petitions for writ of certiorari to the Supreme Court of the United States were filed. In response thereto, the Solicitor General, *sua sponte,* advised the Court that on December 2, 1963, some six months after the indictment, agents of the Federal Bureau of Investigation, through use of electronic recording equipment installed by trespass in the office of a Benjamin Sigelbaum, overheard and recorded a conversation between the defendant Burris and Sigelbaum. This equipment had been installed and maintained on Sigelbaum's office for about a year previous thereto. He also informed the Court that the recording was only "peripherally relevant to the charges underlying [Burris'] conviction;" that the information thus obtained "was not introduced into evidence at trial, that it was never the basis of any investigative lead, and that it was in part already known, through Burris' own statements to government attorneys." The Court nevertheless was impelled to grant each of the defendants an opportunity to evaluate the Solicitor General's revelation and "to establish, if he can, that the interception of this particular conversation, or any other conversations, vitiated in some manner his conviction." *Hoffa, et al.* v. *United States,* 387 U.S. 231-233 (1967). In remanding, the Supreme Court directed the District Court "to confine the evidence presented by

both sides to that which is material to the questions of the content of this and any other electronically eavesdropped conversations, and of the relevance of any such conversations to the petitioners' subsequent convictions." *Hoffa, et al.* v. *United States, supra,* pp. 233-234.

The indictment in this case was the third of a series involving the defendant Hoffa and the Sun Valley development in Florida. The original indictment was returned on December 7, 1960 at Orlando, Florida and dismissed on July 12, 1961 because of the improper empanelling of the Grand Jury. *United States* v. *Hoffa, et al.,* 196 F. Supp. 25 (D.C. Fla. 1961). A second indictment involving the same defendant and the same subject matter was returned on October 11, 1961 at Orlando, Florida. That indictment was dismissed on June 4, 1963, the same day that the Chicago indictment was returned. In point of time, therefore, the overheard conversation of December 2, 1963 was nearly three years after the return of the original Florida indictment and six months after the return of this indictment.

The government has now introduced in evidence two Federal Bureau of Investigation Reports, which are summaries of the admitted overhearing of December 2, 1963. Plaintiff's Exhibits 2-3 and 3-1. Except for the December 2, 1963 overhearing and nine additional overhearings, the government has sworn by affidavit that the Federal Bureau of Investigation after diligent search of its files, records and indices had found no other records of any overhearings of any conversations by defendants. The records of the nine overhearings were tendered to the Court in a sealed envelope for an *in camera* inspection, Plaintiff's Exhibit 1-A. The Court has carefully read this Exhibit which discloses extremely brief overhearings that contain no information either remotely or peripherally relevant to

the transactions and evidence on which these defendants were indicted and convicted. Plaintiff's Exhibit 1-A has been resealed and is available for review purposes. Affidavit evidence was also presented by the government that the Internal Revenue Service had caused a diligent search to be made of its records, files and indices and found no record of any electronically eavesdropped overhearings of any conversation by these defendants.

The next phase of the government's evidence was directed to establish that not only was all the information contained in the December 2, 1963 electronically eavesdropped overhearings known to the government long prior to the overhearings, but that the information so procured did not furnish the government any investigative leads. Plaintiff's Exhibits 4-27.

A log of the December 2, 1963 overhearing reveals eleven items of information, Plaintiff's Exhibit 1: (1) Burris' interest in Sun Valley; (2) Dranow's interest in Sun Valley; (3) Sigelbaum's interest in Sun Valley; (4) Hoffa's interest in Sun Valley; (5) that either Dranow's or Sigelbaum's interest in Sun Valley was subject to a bank claim; (6) that there was a $57,000 transaction with Irving Kipnis; (7) that Willis was the Trustee; (8) that Burris got money from "The Airport"; (9) the protections surrounding the granting of loans from the pension fund; (10) that Hyman spent the loans differently than he should have; and (11) the use of the word "bail-out".

As to each of these items, the Court finds that the evidence establishes prior knowledge by the government of

(1) Burris' interest in Sun Valley from (a) Burris' sworn testimony before the McClellan Committee on 6/29/59 and 10/21/59 set forth in government's Additional Appendix, pp. 74 and 92; (b) an FBI interview with Burris

dated 10/2/62, Plaintiff's Exhibit 19; (d) an interview with J. Friedman dated 11/15/60, Plaintiff's Exhibit 5.

(2) Dranow's interest in Sun Valley from the same sources as Burris' and also a statement of Edwin H. Willis dated 12/22/60, Plaintiff's Exhibit 9.

(3) Sigelbaum's interest in Sun Valley from (a) an FBI interview with Sigelbaum dated 11/15/60, Plaintiff's Exhibit 4; (b) an FBI interview with J. Friedman dated 11/15/60, Plaintiff's Exhibit 5; (c) a statement of Edwin H. Willis, dated 12/22/60, Plaintiff's Exhibit 9.

(4) Hoffa's interest in Sun Valley from an FBI interview with Burris dated 6/12/60, Plaintiff's Exhibit 17.

(5) A bank having a claim with reference to Dranow's or Sigelbaum's interest in Sun Valley, from Lou Poller's Grand Jury testimony of October 1962, Plaintiff's Exhibit 25, pp. 45-46.

(6) The $57,000 transaction with Irving Kipnis, from (a) an FBI interview with Kipnis dated 7/2/62, Plaintiff's Exhibit 6; (b) an FBI contact with Kipnis dated 7/31/62, Plaintiff's Exhibit 7; (c) an FBI interview with Kipnis dated 10/31/63, Plaintiff's Exhibit 8; (d) a signed statement by Kipnis dated 5/31/63, Plaintiff's Exhibit 11; (e) an IRS interview with Kipnis dated 8/6/62, Plaintiff's Exhibit 12; (f) Grand Jury testimony of Kipnis dated 9/18/62, Plaintiff's Exhibit 22; (g) Grand Jury testimony of Kipnis dated 9/18/62, Plaintiff's Exhibit 23.

(7) Willis being Trustee, from (a) an FBI interview with Sigelbaum dated 11/15/60, Plaintiff's Exhibit 4; (b) an FBI interview with Friedman dated 11/15/60, Plaintiff's Exhibit 5.

(8) Burris getting money from "The Airport", from (a) an FBI interview with Jack Cooper dated 2/15/61, Plaintiff's Exhibit 10; (b) an FBI interview with George Simon dated 2/14/61, Plaintiff's Exhibit 15; (c) a signed statement of George Simon dated 2/2/61, Plaintiff's Exhibit 16.

(9) The protections surrounding the granting of loans, from (a) the Grand Jury testimony of Morris Lieberman dated 2/8/62, Plaintiff's Exhibit 20; (b) the Grand Jury testimony of Stanford Clinton dated 10/17/62, Plaintiff's Exhibit 26.

(10) Hyman spending the loan funds differently than he should have, from (a) Hyman's interviews with FBI agents on 1/30/61, 6/20/61, and 7/7/61 as appears in the Appendix of this case at page 900 in which Hyman told the FBI agent that he had used $100,000 of the first loan to buy an interest in Sun Valley which necessitated the taking out of the second loan; (b) the Grand Jury testimony of Canavan dated 9/11/62, Plaintiff's Exhibit 21; (c) the Grand Jury testimony of Hyman dated 10/10/62, Plaintiff's Exhibit 24; (d) the Grand Jury testimony of Cecil Black of 8/27/62, Plaintiff's Exhibit 27; (e) the testimony of Agent Connors who testified in this hearing that in 1962 he examined Hyman's books and records for 1960 and 1961.

(11) The use of the word "bail-out", from the testimony of the witness Langford, Appendix page 1400, who said that Hyman in 1960 asked him how much it would take to bail-out Sun Valley.

The defendants' evidence falls into three categories. First, they sought to elicit information from Justice Department employees, present and past, Federal Bureau of Investigation employees, and Internal Revenue Service

employees that there were other overhearings or records thereof that were not disclosed in the government's case. This effort was unsuccessful for their testimony corroborated the evidence submitted by the government.

An important background factor to an evaluation and consideration of the next two categories is the defense evidence that at some time prior to January 1, 1967 there was outstanding a reward for $200,000 which was publicly offered for any information leading to proof of wiretapping by any federal agent of the telephone of Mr. Hoffa.

The second category related to evidence of electronic eavesdropping, or suspected electronic eavesdropping, of Mr. Hoffa, his attorneys and employees. Mr. Ragano, one of the attorneys in this case, filed an affidavit that he suspected that his office and home phones in Florida were wiretapped in the early 1960's with the knowledge of the Southern Bell Telephone Company. No other evidence was presented to confirm this suspicion. The officials of Southern Bell, after defense subpoena were issued, averred by affidavit that a search of the files of that company revealed no such evidence existed. Mr. Bufalino, one of Mr. Hoffa's lawyers, testified that about the middle of November 1961, an electronic eavesdropping device was found by local authorities in the hotel room of a Mr. Haggerty, another of Hoffa's lawyers, and was removed by them. Mr. Bufalino admitted he had no personal knowledge as to who placed the device in Mr. Haggerty's room. Charles J. O'Brien, the defendant in *O'Brien* v. *United States*, 386 U.S. 345 (1967), testified that about January 1964 he was investigating Sun Valley for attorneys Haggerty and Bufalino and had talked to them on his phone about his investigation. The suspected trespass on Mr. Ragano's telephone

and the actual trespass in Mr. Haggerty's hotel room fall far short of a permissible conclusion that these were made by the government; in any event, none of the testimony of these three witnesses discloses that any of these defendants were overheard.

The testimony of Harold Jenkins, a private investigator from Miami, Florida, purports to directly implicate the government in a wiretap of the defendant Hoffa. In substance, Jenkins testified that in January 1961 Mr. Wiggins, a manufacturer of electronic surveillance equipment, called him on behalf of a purchaser of a phone tapping unit who needed a local installation man; that he met the purchaser, a Mr. Fetterman, who represented himself to be an IRS agent and flashed a leather folder at him which he did not examine: that Mr. Fetterman told him he wanted the device installed at Room 1102 at the Eden Roc Hotel in Miami Beach, Florida, and also arranged to have the same monitored by Jenkins; that it was installed sometime in February 1961; that such monitoring was done for a period of ten days and the records thereof turned over to Fetterman. Jenkins learned that the occupant of that room was Mr. James Hoffa. Mr. Fetterman paid him $400 and still owes a balance of $350 which Jenkins never sought to collect from either Fetterman or his superiors at IRS. He testified that he revealed the incident for the first time to Frank Short, another investigator, sometime in 1965; that the next time was by affidavit on January 16, 1967 given to Short the day after Short informed Jenkins of a $100,000 reward offered by the Teamsters' Union for any information leading to proof of wiretapping by any federal agent of Mr. Hoffa's telephone; before executing such affidavit Jenkins discovered the reward was $200,000, that Short wanted a part thereof because he could help with the connections and paper work involved, but the amount of the

split was not agreed upon. Jenkins met Lou Poller, a Miami represetnative of the Teamsters, on January 17, 1967 and that night he, Short and Poller flew to Washington where at Teamster headquarters they met with twelve men, among whom were Messrs, Hoffa, Kovens and Bufalino. Jenkins admitted that his motivation in the matter was strictly money although he did not reveal that to Mr. Poller.

The defense had subpoenaed a Mr. Fetterman, an agent for the IRS, who was in the witness room waiting for a call for his testimony. The record shows that government counsel made repeated inquiries of the defense on Fetterman's behalf as to when he would be called. Eventually, defense counsel revealed the information that Mr. Jenkins had seen and observed Mr. Fetterman during the course of this hearing and did not recognize him as being the man under whose direction he had installed the unit. Presumably, because of this lack of identification, Mr. Fetterman was not called to testify for the defense.

Jenkins' testimony was the only evidence which the defense submitted to establish that a wiretap was placed on Mr. Hoffa. This testimony, even if believed in the light of its admitted motivation, fails to prove the essential ingredient that the wiretap was instigated, installed, maintained in operation and recordings therefrom received by and through the activity of any agent of the federal government.

The third category concerns testimony of an alleged offer from a former government employee to furnish the defendant Strate with information on government wiretapping and electronic eavesdropping in exchange for information that would discredit New Orleans District Attorney Jim Garrison and stop the Kennedy assassination

investigation. This testimony was given by the defendant Strate and a New Orleans jurist, Judge Malcolm O'Hara. Because of its nature, its interesting nuances and the weight to be given it, its substance is here set forth. It revealed that these two witnesses were intimate friends, saw each other daily for the last fifteen or sixteen months, played golf together, went to the race track together, ate lunch and dinner together hundreds of times, and that the defendant Strate paid for Judge O'Hara's transportation and hotel bills on trips to Las Vegas and to Washington. Their firm friendship was also revealed through Judge O'Hara's testimony regarding the Partin incident, to be discussed later, when he stated he acted as a messenger boy on that occasion because Strate had asked him to do so, and Strate's testimony that Judge O'Hara complied with his request on the Partin incident because he asked him to do it. Judge O'Hara also testified that whenever they visited Washington they visited the Teamsters' headquarters and he had there met Mr. Fitzsimmons, Mr. Kovens and Buddy Gill, former administrative assistant to Senator Russell Long; that during one of his visits to Washington with Strate one of the discussions at the Teamsters' headquarters concerned Mr. Hoffa being incarcerated at the Lewisburg Penitentiary and how his situation could be alleviated by removal to some other place of confinement.

The touchstone for the testimony of both involved a Mr. Walter J. Sheridan, an employee of the National Broadcasting Company, who had been a former employee of the Department of Justice during the Hoffa trials. Both testified that he was present with them on June 12, 1967 at the Bourbon-Orleans Hotel in New Orleans. The circumstances and the reasons for that meeting are conflicting.

Mr. Strate testified on direct-examination that his meeting with Mr. Sheridan was prearranged, with his consent, by Judge O'Hara who had asked whether he would like to meet Sheridan. During cross-examination Mr. Strate stated he never told Judge O'Hara he had wanted to see Mr. Sheridan; that he first found out he was to meet with Sheridan about two or three days before it took place; that neither Sheridan nor anyone else had advised him that Sheridan wanted to see him; that Judge O'Hara had told him he was arranging a meeting between Walter Sheridan and Edward Baldwin, a former law partner of the Judge but did not tell him why the meeting was to take place; that he said he was willing to attend it although he didn't know its purpose; he later said that before the meeting Judge O'Hara told him that Baldwin had reported to OHara that Sheridan was looking for things that would tend to discredit and destroy Garrison. It was further elicited on cross-examination that Sheridan had asked Strate "Before you go further, what do you want from me?" and Strate's response was, "Hoffa out of jail. You two guys won the war. That is all you wanted, so help us." He admitted that one of the reasons he went to see Sheridan was to get information about bugging or wiretapping in Chattanooga, which reason he repeated several times during the course of his cross-examination; that he told Sheridan that Pershing Gervais was very close to Jim Garrison and if there was anybody that could destroy him, it would be him; that his trading point with Sheridan was for evidence he thought Sheridan had on wiretapping in Chattanooga.

From Judge O'Hara's testimony it appears the meeting with Sheridan was a result of Baldwin's information received from Sheridan that the latter had seen a re-

run of O'Hara's television tapes when he ran against Garrison for District Attorney and had told Baldwin that O'Hara had been in Baton Rouge and talked with a government witness in the Chattanooga trial, which O'Hara admitted; whereupon the Judge told Baldwin he would like to meet Sheridan but that if there was such a meeting he would bring someone with him.

At this meeting, Strate stated that while he and Sheridan were alone a discussion ensued about Sheridan's offer to give him wiretapping and room bugging evidence which would help him in the Chicago hearing if Strate would help discredit District Attorney Garrison; that he assumed Sheridan was working for Robert Kennedy; that he demurred, having no intention of discrediting Garrison, but only wanted information about wiretapping in Chattanooga; that nothing was agreed to between them; that when Judge O'Hara and Baldwin rejoined them, in their presence Sheridan said to Strate, "Why don't you let me help you in Chicago?" This was corroborated by Judge O'Hara on his direct. Strate also knew that Sheridan was subpoenaed to appear before the September Grand Jury for New Orleans Parish empanelled by Judge Malcolm O'Hara, who was Strate's intimate friend.

The government also elicited from Mr. Strate that Judge O'Hara at Strate's request had met with Edward Brady Partin in Baton Rouge, a government witness in the Chattanooga trial, which had been arranged by Mr. Gill and took place in Mr. Gill's office; that the Judge had a predrafted affidavit for Partin to sign in which he confessed wiretapping; that the document had been prepared without ever interviewing Mr. Partin and the Judge asked Partin to sign the affidavit without asking him whether it was true or not; that the Judge did this because Strate had asked

him to do so; Judge O'Hara told Strate that Partin had refused to sign such affidavit.

Judge O'Hara on cross-examination confirmed that in the latter part of February 1967, he, his court reporter, Mr. Levy, and Mr. Strate drove to Baton Rouge to meet Mr. Partin as arranged through Mr. Gill; that he had an affidavit which had been dictated by Harold Brown, an attorney in Chattanooga, Tennessee to his court reporter in Mr. Strate's apartment in New Orleans; that Brown told Judge O'Hara he was one of the attorneys in the Hoffa Chattanooga case; that the Judge had glanced at the contents and saw it contained some allegations with reference to wiretapping in Chattanooga; that he gave the affidavit to Mr. Partin, asked him to read it and that if it was correct, would he signed it; that his role with the affidavit was that of messenger boy and he did it because Strate asked him to.

Mr. Walter J. Sheridan had been subpoenaed by defendants and was waiting in the witness room to be called. The defense, however, did not call for his testimony.

Because of the many conflicts and contradictions in the testimony given by these two close friends, the unquestioned obedience imposed by this friendship, the contradictions in Strate's testimony alone, his declared personal concern for Mr. Hoffa's predicament, all indicate an interest and motivation which casts such doubt upon the credibility of their testimony and this Court refuses to place any credence on it. In any event, even if accepted as true, it fails to show that there were any overhearings of conversations by any of these defendants by the government.

The Court concludes from the evidence adduced on this hearing, that the government obtained no new information

from the electronically eavesdropped overhearings in the record and that none of the overhearings had any relevance to the convictions of any of the defendants. The Court further finds that the convictions of none of the defendants were tainted by the use of evidence improperly obtained.

The motion for a new trial, if such it is, is overruled and a new final judgment on the verdict is hereby entered against all of the defendants with the exception of Hyman, whose death was suggested during the course of the hearing. The same sentences heretofore imposed on each of the defendants are hereby reimposed.

Richard B. Austin
Judge, United States District Court

Dated: September 22, 1967

APPENDIX F

In the

United States Court of Appeals

For the Seventh Circuit

No. 16334 SEPTEMBER TERM 1967—APRIL SESSION 1968

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
JAMES R. HOFFA, BENJAMIN DRANOW, ZACHARY A. STRATE, JR., S. GEORGE BURRIS, ABE I. WEINBLATT, CALVIN KOVENS,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois.

AUGUST 15, 1968

Before CASTLE, *Chief Judge*, DUFFY, *Senior Circuit Judge* and SWYGERT, *Circuit Judge.*

DUFFY, *Senior Circuit Judge.* In August 1964, following a jury trial, defendants were found guilty on various counts contained in an indictment charging them with wire and mail fraud in the procurement of loans from the Teamsters Union Pension Fund, and of conspiracy to commit the substantive offenses stated. 18 U.S.C. §§ 1341, 1343, 371. This Court, one judge dissenting, affirmed the convictions. *United States of America* v. *Hoffa, et al.*, 367 F.2d 698 (1966).

EAVESDROPPING

In response to a petition for a writ of certiorari before the Supreme Court, the Solicitor General urged that none of the issues raised by the defendants warranted the issuance of the writ. However, acting *sua sponte*, the Solicitor informed the Supreme Court that on or about January 21, 1963, the Federal Bureau of Investigation installed a microphone by trespass in the office of one Benjamin Sigelbaum, Miami, Florida, and that this electronic device was maintained on such premises until July 12, 1965; that on December 2, 1963, some six months after the return of the June 4, 1963 indictment in this case, defendant Burris visited Sigelbaum's office and engaged in a conversation with Sigelbaum which was electronically overheard through this device; that a verbatim transcript of the conversations appeared in the Federal Bureau of Investigation's logs and was summarized in an FBI report.

The Government pointed out that the overheard conversation was not introduced into evidence at the trial of Burris and his co-defendants. It further represented that any conceivably relevant information was theretofore known to the Government from wholly independent sources. It represented that the information had no relationship to any of the defendants except Burris. The Government suggested to the Supreme Court that if a remand for a hearing be ordered, it should be as to defendant Burris only.

Without reaching the issues raised in the petition, the Supreme Court remanded the case to the District Court for a hearing on the issue of electronic eavesdropping. In its opinion the hearing was to provide each of the defendants with "an opportunity to establish, if he can, that

the interception of this particular conversation, or of other conversations, vitiated in some manner his conviction." *Hoffa et al.* v. *United States*, 387 U.S. 231, 233 (1967). The District Court was directed to hold a hearing and to "confine the evidence presented by both sides to that which is material to questions of the contents of this and any other electronically eavesdropping conversations, and the relevance of any such conversations to petitioners' subsequent conviction." (387 U.S. at 233-234).

The District Court was instructed that if it found taint resulting from any such intercepted conversations, it was to direct a new trial as to the particular defendant whose conviction was thus found to be infected; if it found no taint, it was to enter new final judgments of conviction. (387 U.S. at 234).

A hearing was held before District Judge Austin. *United States of America* v. *Hoffa, et al.*, 373 F. Supp. 141 (N.D. Ill., E.D., 1967). The Court stated it would require the Government to establish *prima facie* that the overheard Burris-Sigelbaum conversation of December 2, 1963 did not taint any of the convictions, and that there were no other "electronic trespasses" which resulted in the obtaining of any evidence "which aided in the convictions in this case." The District Court considered this category to include any electronically eavesdropped conversations in which any of the defendants participated. The District Court also directed the Government "to disclose what electronically eavesdropped conversations involving these defendants that there is a record of in the Federal Bureau of Investigation and in the Internal Revenue Department. . . ."

The District Court stated that the defense would be permitted to "produce whatever evidence [it] can find

in regard to electronic eavesdropping involving the other defendants in this case, or the lawyers in this case, in which this trial was discussed, or preparations for this trial were discussed."

At the District Court hearing, government counsel represented that in addition to the Sigelbaum-Burris conversation, it had in its possession nine logs of "certain isolated, accidental and absolutely irrelevant overhearings of some of these defendants."

The Government introduced an affidavit from Charles Bolz, Chief of the Accounting and Fraud Section of the FBI. This affidavit stated that diligent searches of the FBI records regarding electronic eavesdropping of conversations participated in by any of the defendants in this case disclosed only the Burris-Sigelbaum conversation of December 2, 1963, and the conversations which were contained in sealed Exhibit 1-A. This sealed exhibit was attached to the Bolz affidavit. At the Court's direction, the Government turned Exhibit 1-A over to the Court for an *in camera* inspection. There were no existing notes or tapes of the conversations in Exhibit 1-A.

At the conclusion of the inspection of all the logs contained in Exhibit 1-A, the District Court concluded that they were not remotely relevant to the issues in this case and denied the request of the defendants to examine same. The District Court ordered that the logs be resealed and made available to this Court on appeal.

At the conclusion of the oral argument on this appeal, the three members of this panel examined the logs contained in Exhibit 1-A. We agree with the District Court that nothing contained therein is relevant to the issues in this case.

An affidavit by Loren Green, Deputy Assistant Commissioner of the Internal Revenue Service, also was read into the record at the hearing. This affidavit stated that searches had been made of the records of the Internal Revenue Service, but that these searches failed to disclose records of any electronic overhearings on the part of the defendants.

Defendants moved to strike the Bolz and Green affidavits. These motions were denied. The District Court pointed out that no restrictions would be placed on the defendants calling these affiants as witnesses or otherwise, in an endeavor to establish the alleged falsity of their affidavits. The defense never sought to call either Bolz or Green as a witness for cross examination or otherwise.[1]

Upon oral argument of this appeal, the Court asked defense counsel what cross examination, as a practical matter, could have been had, other than asking the witness if he had searched the records and that no records of eavesdropping had been found.

Counsel for defendant Hoffa told the Court that he would have demanded the right to examine all of the index cards which the witness had checked in his search. In other words, counsel, in effect, argued that he desired the right to freely examine the records and files of the FBI.

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[1] Joseph Harmon who, in 1963, was Assistant Chief of the Intelligence Division of the Internal Revenue Service, was called as a defense witness at the hearing. He testified that to his knowledge there was no electronic eavesdropping or wire tapping of any conversations of the defendants in the instant case from 1961 through 1964.

We hold that no prejudicial error was committed in receiving into evidence the affidavits of Bolz and Green. (Rule 27, Fed. Rules of Criminal Procedure). Also, the District Court did not err in examining the FBI records *in camera*. *United States* v. *Battaglia and Evans*, 394 F. 2d 327 (7 Cir., 1968). Such procedure, in any event, could be no more than harmless error. *Chapman et al.* v. *California*, 386 U.S. 18, 24 (1967). If *certiorari* should be granted in this case, the nine logs of "certain isolated, accidental and absolutely irrelevant overhearings of some of these defendants" will be available for inspection and examination by the Supreme Court.

The District Court concluded "that the government obtained no new information from the electronically eavesdropped overhearings in the record and that none of the overhearings had any relevance to the convictions of any of the defendants." (273 F. Supp. at page 147). The record sustains this finding and conclusion.

The District Court found "that the convictions of none of the defendants were tainted by the use of evidence improperly obtained." (273 F. Supp. at page 147). We agree!

The Court made particular reference to the nine overhearings submitted to the Court for *in camera* inspection. The Court found that they "contain no information either remotely or peripherally relevant to the transactions and evidence on which these defendants were indicted and convicted." (273 F. Supp. at page 143). Again, we agree!

The District Court denied motions for a new trial, entered new final judgments of conviction against each of the defendants, and reimposed the original sentences. (273 F. Supp. at pages 147 and 148).

It should be kept in mind that the detailed indictment which was returned against the defendants on June 4, 1963, was some six months prior to the date of the conversation between Burris and Sigelbaum. The indictment spelled out in detail the roles played by each of the defendants in seeking and obtaining inflated loans from the Teamsters Pension Fund. The indictment also charged that defendant Hoffa used his position as a trustee to influence the approval of such fraudulent loan applications.

The indictment mentioned all of the loan transactions which were proved at the trial including Hyman's Key West Foundation and the Miami Airport hotel loans, both of which were mentioned in the Burris-Sigelbaum conversation.

It is apparent the charges made against the defendants in the indictment were drawn in such detail and particularity that they could have come only from a full investigation of all the facts underlying the scheme. It is neither conceivable nor realistic to believe that this information could have been obtained from a cryptic half hour conversation which occurred six months after the indictment had been returned.

It seems clear that the Government's case against the defendants was based upon years of extensive investigation which was initiated and completed long before the unintended and unplanned overhearings of defendant Burris on December 2, 1963.

It also seems significant to us that the overhearing occurred as the result of a surveillance of Sigelbaum and was not the product of any investigation conducted as to any defendant in this case. It is our decision that the District Court was correct in concluding that any possibly

relevant information contained in the talk between Sigelbaum and Burris was known to the Government from wholly independent sources.

There is nothing in the evidence at the hearing to indicate that the Government used the memoranda summarizing the overheard conversations.

At the oral argument on this appeal, the attorney who represented the Government disclosed for the first time in any court proceeding, that eavesdropping of certain attorneys had occurred. The attorney handed to this Court a sealed folder which contained the FBI logs of the conversations. We have examined *in camera* the contents of the sealed folder and have concluded that the information is completely irrelevant to the Hoffa case before this Court. Since this information is completely irrelevant, we see no need to remand the case to the District Court for findings and conclusions regarding the contents of this folder. *United States* v. *Battaglia and Evans,* 394 F. 2d 327 (7 Cir., 1968). This is not to say that this Court sanctions eavesdropping of attorneys. We do not. However, the conversations overheard are irrelevant. This case is therefore unlike *O'Brien et al.* v. *United States,* 386 U.S. 345 (1967) and *Black* v. *United States,* 385 U.S. 26 (1966). In the latter two cases, the attorney-client relationship was breached. No such circumstances are presented here. *Cf. Granello et al.* v. *United States,* 386 U.S. 1019 (1967).

NONPRODUCTION OF DOCUMENTS

The defendants argue to this Court that FBI Agent, John Connors' memoranda of December 26, 1963 and January 11, 1964, summarizing the eavesdropped conversation of Burris and Sigelbaum, and Connors' memorandum of October 8, 1963, relating to the preparation of the summaries, should have been disclosed to the defendants at the

trial. Defendants' argument is based on the disclosure policy of 18 U.S.C. § 3500. The basic requirement of 18 U.S.C. § 3500 is that "After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement . . . of the witness in the possession of the United States which relates to the subject matter to which the witness has testified." Statement is defined as "a written statement made by said witness and signed or otherwise adopted or approved by him; or . . . a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement."

The memoranda demanded by the defendants fail to meet the statutory requirements of 18 U.S.C. § 3500. The purpose of this statute is to disclose to the defendants those statements which are relevant to the witness' cross examination. *Palermo* v. *United States,* 360 U.S. 343, 349-351 (1959); *Rosenberg* v. *United States,* 360 U.S. 367, 370 (1959). This test is not met. Connors testified as an accounting expert for the United States at the trial. He testified that defendant Hyman did not, in 1960, incur expenditures for his Key West Foundation in the amount he had represented to the Pension Fund of the Teamsters Union. Connors' memoranda of the Burris-Sigelbaum conversation did not relate to his accounting testimony. Therefore, the conclusion is inescapable that it had no impeachment value to the defendants.

Defendants contend that the Burris-Sigelbaum conversation revealed that Hyman spent the Pension Fund loan in 1961 in accord with his agreement with the Pension Fund. The fraud was the false representations made in

1960; the manner in which Hyman spent the money in 1961 is irrelevant. In any event, the defendants knew how Hyman spent the money. As the Supreme Court said in *Rosenberg, supra,* page 371 "Since the same information that would have been afforded had the document been given to defendant was already in the possession of the defense . . . it would deny reason to entertain the belief that defendant could have been prejudiced by not having had opportunity to inspect the . . . " documents.

Defendants also argue that nondisclosure of the log of the Burris-Sigelbaum conversation and two summaries of the eavesdrop log which were prepared by Connors, violated their constitutional right to due process. *Brady* v. *Maryland,* 373 U.S. 83, 87 (1963) and *Giles et al.* v. *Maryland,* 386 U.S. 66 (1967) *Brady* makes clear " . . . that the suppression by the prosecution of evidence favorable to the accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Since the log and the summaries were not used as evidence at the trial, and since they did not lead to any other evidence which was used at the trial, it cannot properly be claimed that the log and summaries were evidence "material either to guilt or to punishment." (373 U.S. at 87).

OTHER DEFENDANTS NOT PREJUDICED BY BEING TRIED WITH DEFENDANT DRANOW.

Relying on evidence as to Dranow's mental competency introduced at the hearing in 1967, the defendants, other than Dranow, urge he was mentally incompetent at the time of the trial in 1964, and therefore they were prejudiced by being tried with him.

Despite the Government's readiness at the trial to have Dranow examined by psychiatrists, and the trial court's willingness to hold a competency hearing based on such examination, it was at the request of defense counsel that such a hearing was postponed until defendants' psychiatrists could conclude the examination of Dranow and had filed their report. The trial court made several inquiries as to any such report but none was ever filed. Under such circumstances, the trial court could properly have concluded that any substantial claim of Dranow's mental incompetency had been abandoned by the defense.

DECISION IN BRUTON v. *UNITED STATES*

In defendants' supplemental brief which was filed by permission on the date of the oral arguments on this appeal, it is argued that the recent decision of *Bruton* v. *United States,* 391 U.S. 123 (1968) requires a reversal of this case. We disagree!

In *Bruton*, petitioner and one Evans were tried together on the charge of armed postal robbery, 18 U.S.C. § 2114. At the trial, the confession of Evans that he and Bruton committed the robbery was admitted into evidence. The trial judge instructed the jury that although Evans' confession was competent evidence against Evans, it was inadmissible hearsay against petitioner and, therefore, must be disregarded in determining petitioner's guilt or innocence.

The Supreme Court reversed, finding unreasonable the assumption that the jury could consider the confession only as to the confessor. That Court held that in spite of the insulating instruction, the admission of this confession at the joint trial deprived the codefendant (petitioner) of his constitutional right to confront and cross examine his accusers.

In the case at bar, statements made by Burris under oath to a Congressional Committee were read to the jury with the Court admonishing the jury that the questions and answers could be considered by the jury only against the defendant Burris. [These statements were not incriminating with respect to the indictment in this case or as to any co-defendant.]

The statements to the Committee had to do with the interest of Burris and Dranow in Union Land and Home Company, the purchase by that Company of Hoffa's and Lower's interests in Sun Valley, and the payment by Union Land and Home Company to Teamsters Local 299 of interest on money deposited by the Union in a Florida bank which had made loans to Sun Valley. It is important to note that these were matters about which there was no substantial dispute.

There is nothing in Burris' statements with reference to the procurement of Pension Fund loans by fraud. There was no mention of using Pension Fund loan proceeds to aid Sun Valley in getting out of its financial troubles. The situation which we are here considering is entirely different from the "powerfully incriminating statements" in *Bruton*. There is no good reason to believe that the jury could not follow the limiting instructions of the Court in regard to these statements.

In *Bruton, supra* (page 135), the Supreme Court stated: "Not every admission of inadmissible hearsay or other evidence can be considered to be reversible error unavoidable through limiting instructions; instances occur in almost every trial where inadmissible evidence creeps in, usually inadvertently. . . . It is not unreasonable to conclude that in many such cases the jury can and will follow the trial judge's instructions to disregard such information."

Defendant makes a further argument claiming error in regard to the socalled "Link" letters. These were originally admitted into evidence only as to Dranow, but the Court ultimately excluded them from evidence as to all defendants, including Dranow. The Court gave an appropriate instruction.

This question was fully covered by our original opinion in this case. We can find nothing in *Bruton* that affects the validity of our prior decision on this point.

We note that, unlike the situation in *Bruton*, Dranow was a witness at the trial and was subject to cross examination by his co-defendants. No one prohibited the cross examination of Dranow. It was a matter of trial strategy when the defendants decided not to cross examine.

ISSUES DECIDED ON FIRST APPEAL

Defendants raise three additional issues on this appeal: 1) that the Government failed to prove a single conspiracy; 2) that the indictment was erroneously delivered to the jury, and 3) that the jury was prejudiced by having seen a certain newspaper article.

All of these issues were fully briefed and argued on the original appeal and were decided by this Court. It is, perhaps, true that this Court has the power to reconsider these issues, but we do not choose to do so. There has been no change in the applicable law since the date of our decision as was the situation in several of the court decisions cited by defendants.

It is true that in our previous decision, one judge dissented. It also is true that all of the judges of this Court except two voted to deny a petition for rehearing en banc.

We see no reason for not following the well-established "law of the case doctrine" which is that except in unusual

and compelling circumstances, appellate courts should not relitigate issues which they already have decided. *Smith* v. *United States*, 332 F.2d 720-721 (DC Cir., 1964); *United States* v. *Meredith*, 172 F.2d 745, 746 (7 Cir., 1949); 1B Moore's Federal Practice Sec. 0.404 (10) at pages 573 and 574 (2d Ed., 1961). No such unusual and compelling circumstances exist in this case.

Several additional issues have been argued by one or more of the defendants. Inasmuch as we consider them to be without merit, we think further reference to such claims in this opinion is not necessary.

The judgment of the District Court is

AFFIRMED.

No. 16634.

SWYGERT, *Circuit Judge*, dissenting.

I dissent principally on two grounds. First, the Government failed at the hearing to sustain its burden of proving that the convictions were untainted by the illegal eavesdropping on the Burris-Sigelbaum conversation. Second, the Government failed at the trial to disclose to either the district court or the defense counsel the existence of statements that were arguably within the purview of 18 U.S.C. § 3500.

I.

The salient facts surrounding the illegally overheard conversation and the use the Government made of it are as follows.

During 1962, 1963, and part of January 1964, Federal Bureau of Investigation agent John Connors, who was assigned to the F.B.I. office in Miami, Florida, conducted an investigation of defendant Samuel Hyman and his Key West Foundation Company properties, defendant Calvin Koven's activities in connection with the Pension Fund,

and defendant James R. Hoffa's activities in connection with Pension Fund loans. Agent Connors initially examined the records of the Key West Foundation on two separate occasions in 1962. He again examined these records in 1963 and 1964 while he was working in Chicago with the Government prosecutors in preparation for the trial of this case which occurred during the summer months of 1964. At the trial, agent Connors testified on behalf of the Government. His testimony related mainly to the contents of the books and records of the Key West Foundation.

At the hearing in 1967 in the district court, conducted pursuant to the remand ordered by the Supreme Court, *Hoffa* v. *United States,* 387 U.S. 231 (1967), the Government disclosed that a conversation between Benjamin Sigelbaum and the defendant George Burris, occurring on December 2, 1963 in Sigelbaum's Miami, Florida office, had been overheard surreptitiously by means of an electronic device. According to the testimony at the hearing, the two F.B.I. clerks, who were monitoring the conversation, contemporaneously prepared a log of the eavesdropped conversation.[1] Thereafter the log was routed by a F.B.I. supervisor to agent Connors, although another F.B.I. agent was assigned to the investigation being conducted of Sigelbaum in connection with activity unrelated to the instant case.

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[1] The Government produced and filed the log in the district court prior to the hearing. The revelation of the existence of the log occurred when the Government informed the Supreme Court about it during the pendency of the defendants' petition for a writ of certiorari to review the judgment of this court. The Government, however, did not furnish the log to the Supreme Court.

After studying the log, agent Connors prepared a summary report of the information contained in the log. This report, dated December 26, 1963 and containing direct quotations from the log, was sent to F.B.I. headquarters in Washington, D. C. No attempt was made to conceal the fact that the report reflected an overheard conversation.

On January 11, 1964 agent Connors prepared a second report of the information contained in the log. According to agent Connor's testimony at the hearing, this report was a "resubmission of the December 26, 1963 memo after administrative corrections." A comparison of the two reports indicates that, unlike the first report, the second report was written in an attempt to camouflage the fact that the information in the report was obtained from a "bugged" conversation. Copies of this second report were forwarded to the F.B.I. headquarters, and also to that agency's Chicago office where it was turned over to the Government prosecutors in charge of the instant prosecution. This copy of the January 11 report shows notations and comments in the margin of the document placed there by the Government attorneys. In addition certain words of the report are underlined, presumably by these same attorneys. The pertinent part of the report, insofar as it concerns the Key West Foundation loans from the Pension Funds, reads: "Burris felt, according to the source, that in the Key West case, *Sam Hyman* used the money a little differently when he first obtained it and then *ultimately put it into* the property."[2] (Emphasis in

[2] That part of the log which is summarized in this statement reads:

> HYMIN was supposed to have used the money this way, he spent the money a little bit differently but it was spent. Do you understand, he said "I'll buy a hundred refrigerators."— instead of that he bought other things and bought other equipment, but he spent the money because he was renting apartments, conditions were different, . . .

original.) In the margin of the report adjacent to this statement appears the comment of a Government attorney, "Does this check out?"

At the trial in 1964, agent Connors testified extensively with regard to information contained in an accounting summary he prepared which reflected the income and expenditures of the Key West Foundation during the period from November 1, 1959 to December 31, 1960. On *voir dire* examination conducted by defense counsel prior to the admission of the summary into evidence, agent Connors testified that this document and the underlying work sheets were not prepared until two weeks before he testified. He also testified that he had been instructed by the Government trial counsel that his summarization of the Key West Foundation records should terminate as of December 31, 1960. During this same examination, he admitted that he had destroyed work sheets which he had prepared earlier.[3]

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[3]Agent Connors' pertinent testimony at the trial on this subject is as follows:

[By Mr. Walsh, defense counsel]

Q. . . . when did you prepare the work sheets?

A. Oh, about a week ago, sir, over a week, about ten days ago, sir.

Q. I see.

Did you have other work sheets prior to that time?

A. I had various work sheets, yes, sir, at that time.

Q. Are they included in this Exhibit 105?

A. No, sir, they were destroyed. They were not kept.

Q. Well, were they destroyed after you showed them to the prosecutors or before?

A. I don't recall, sir.

Q. Why were they destroyed?

A. Well, they were not to be used in connection with any

At the hearing on remand in 1967, the Government produced a document prepared by agent Connors on October 8, 1963 which he characterized as a "memorandum."[4] This document disclosed the fact that around September 30, 1963 agent Connors had consulted with Government trial counsel "concerning accounting summaries [of the records of the Key West Foundation] to be prepared for the forthcoming trial. . . ." The document indicated that these summaries should reflect the "source of all funds" received by the Key West Founda-

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results of an investigation.

Q. How did you find that out?

A. Discussion with the prosecutors.

Q. They told you they didn't want to use those?

A. Yes, sir.

Q. Did they see them?

A. I presume they saw them or we discussed them with them.

* * *

Q. Will you tell us why you end this statement as of December 31, 1959 [1960]?

A. What [that] was the period of time I was requested to cover by government counsel, sir.

* * *

Q. But you had looked at the books for periods beyond that?

A. I had access to them, yes, sir.

Q. Well, had you examined them?

A. Yes, I had looked at them.

Q. And had you prepared work sheets for those longer periods?

A. I would say I did prepare some, perhaps, yes, sir. I would say I prepared some work sheets for that period, yes.

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[4] *See* note 7 *infra*.

tion and the "disposition of such funds" for the period "10/27/59-4/30/61."[5]

Furthermore, at the hearing, agent Connors again admitted (on cross-examination) that after he had consulted with the Government prosecutors, he had destroyed his work sheets prepared prior to those from which he testified as the trial. On this occasion, he also admitted

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[5] In pertinent part, the October 8 document read:

The A series of schedules will be captioned Total Funds Received and Disbursed by Teamster Pension Fund Loan Borrowers During Period Covered by Investigation. An individual schedule will be prepared . . . on each Pension Fund Loan Borrower to be included in the summary (as will be identified below) covering the period from the time of their first receipt of Pension Fund loan proceeds through the complete expenditure of the last of such proceeds. These schedules will show the source of all funds received by the Borrower during this period and the disposition of such funds. An example of the format of one of these individual schedules, as will be utilized wth regard to the Key West Foundation Company, Inc. loans, is as follows:

Key West Foundation Co., Inc.—

10/27/59 — 4/30/61

Source of Funds

From Operations
Teamster Pension Fund Loans
Etc.
Total

Disposition of Funds

Operating Expenses
Construction Costs
Ben Dranow
Abe I. Weinblatt
S. George Burris
Davis Trust Account
(Orlando, Sun Valley)
Etc.
Total

that the destroyed work sheets had covered a period of time different from the period covered by those used at the trial.[6]

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[6] Agent Connors' pertinent testimony at the hearing on this subject is as follows:

[By Mr. Walsh, defense counsel]

Q. Mr. Connors, you prepared worksheets, I assume, in order to reach the conclusions that you testified about yesterday?

A. Yes, sir, I did.

Q. And at the time that you testified in 1964, did you have all of the worksheets that you had prepared in the investigation?

* * *

A. I don't believe I understand what you mean, Mr. Walsh, by "all the worksheets that I had."

Q. Which you had prepared in the investigation of the Poinciana and other properties related to Mr. Hyman?

A. I had some of them, yes, sir.

Q. Well, as I understand you, your answer is not yes, your answer is that you had some?

A. Yes.

Q. What happened to the others?

A. They had been destroyed.

Q. Now, did they cover a longer period than the one about which you testified at that time?

A. Some of those that had been destroyed had covered a longer period, yes, sir.

Q. And did that destruction occur after consultation with attorneys who were prosecuting the case?

A. I would say it occurred after one or more consultations, yes, sir.

* * *

Q. They were schedules of abstracts that you made from the books?

A. Yes, sir.

Q. Were they different from the ones that were presented at the trial in any respect? I am not saying they were distorted, just different.

A. I don't think they were different, no sir.

Testimony at the trial in 1964 by a defense accounting expert concerning the records of the Key West Foundation showed that the Key West Foundation had expended a large sum of money for building improvements and construction not only in 1960 but also in 1961. The work sheets which agent Connors prepared after consultation with the Government prosecutors around September 30, 1963 presumably also reflected the expenditures for both years. However, the accounting summary prepared by agent Connors, shortly before he testified at the trial but shortly after the Government was aware of the content of the Burris-Sigelbaum conversation, did not reflect the 1961 expenditures.

The inferences from the foregoing facts are apparent. After the Government learned, through the overheard conversation, that Hyman's defense would probably be that although he had used the Pension Fund loan proceeds "a little bit differently when he first obtained" them, he had "ultimately put . . . [them] into the property," the Government prosecutors instructed agent Connors to terminate his accounting summary of the Key West Foundation records as of December 31, 1960 and to destroy his previous work sheets which reflected a longer time period.

Q. Did they cover different periods?

A. They would have covered perhaps a period — yes, a different period.

Q. So they were different in that respect?

A. Somewhat, yes, sir.

Q. Did you show those to the prosecutors?

A. I don't recall at this time precisely whether I showed them to them or whether they saw them by their own review of what we had or not.

* * *

The Government insists, however, that it made no use of the overhead conversation. In support of this contention, the Government argues that its prosecutive theory was to show that defendant Hyman made "false representations to the Pension Fund that he [Key West Foundation] had, during 1960, incurred construction expenditures totalling over $700,000"; that evidence independent of agent Connors' testimony showed that no such construction expenditures had been incurred; and that agent Connors' testimony corroborated this evidence by showing that the Key West Foundation records indicated no disbursement of funds during 1960 for construction in the amount Hyman represented. In sum, the Government argues that what the Key West Foundation expended for construction in 1961 "was irrelevant to the government's theory. . . ."

The Government's argument misses the point. The facts contained in the Key West Foundation records were known by both the Government and the defendants. But what the Government did not know, save for the overheard conversation, was what Hyman intended to assert as a defense to the Government's charges. When the Government gained that knowledge, agent Connors, pursuant to the directions of the Government prosecutors, tailored his accounting summary and his testimony. Thus, the Government attempted to forestall or destroy the defense indicated in the overheard conversation, namely, that Hyman, regardless of what had gone on before, had ultimately invested the entire proceeds of the Pension Fund loans in improvements to and construction of the properties secured by the loans. These considerations demonstrate the lack of substance in the Government's contention.

The Government conceded that it had the burden at the hearing of showing that its illegal activities in respect to the eavesdropped conversation did not taint the convic-

tions of the defendants. *Silverthorne Lumber Company, Inc.* v. *United States,* 251 U.S. 385, 392 (1920); *United States* v. *Coplon,* 185 F.2d 629 (2d Cir. 1950); *United States* v. *Goldstein,* 120 F.2d 485 (2d Cir. 1941), *aff'd.* 316 U.S. 114 (1942). In my opinion, the Government did not meet that burden in this case.

II.

At the trial, there was an understanding that Government counsel "would provide . . . [defense counsel with statements required by 18 U.S.C. § 3500] as soon as the witness takes the stand." Prior to the testimony of agent Connors at the trial, however, Government counsel proffered no section 3500 statements to defense counsel relating to his testimony. In response to defense counsel's queries to discover if any such statements were in existence, agent Connors denied that he had rendered "any report concerning . . . [his work]." Subsequent efforts by defense counsel to discover the existence of such statements were objected to. The district judge sustained the objection, saying, "You went all over that yesterday looking for 3500 statements."

Despite the Government's intial denial that agent Connors had prepared any reports, it was disclosed at the hearing conducted pursuant to the Supreme Court's remand that he had in fact prepared three reports in 1963 and 1964. Two of the reports were the summaries, dated December 26, 1963 and January 11, 1964, of the electronically overheard Burris-Sigelbaum conversation. In the third report ("memorandum"),[7] written on October 8, 1963, agent Connors set forth the type of accounting summaries he was to prepare for use at the trial.

[7] The Government argued that the October 8 document was "not a report on work," but rather a "memorandum" concerning "a conversation in which work was asked to be performed."

The defendants argue that by concealing the existence of these reports at the trial, the Government unilaterally deetrmined whether the reports came within the purview of 18 U.S.C. § 3500, thereby usurping the district court's authority to make such determinations. The Government argues in reply that the defendants' claim of prejudice due to noncompliance with section 3500 "rests upon an unwarranted assumption as to the importance of agent Connors' direct testimony"; that the two summaries of the Burris-Sigelbaum conversation did not relate to agent Connors' direct testimony and were not within the purview of section 3500; that the summaries of the Burris-Sigelbaum conversation "added nothing to what the defense already knew"; and that "in any event, even if . . . [the] October 1963 memorandum were a statement of the witness [Connors] . . . within the reach of 18 U.S.C. 3500, it had negligible—if any—impeaching worth."[8]

I am unable to agree with the majority's resolution of the issues raised by the Government's failure to produce the three reports. After observing that agent Connors' reports failed to meet the requirements of 18 U.S.C. § 3500, the majority states, "the conclusion is inescapable that it had no impeachment value to the defendants."

In *Rosenberg* v. *United States*, 360 U.S. 367, 371 (1959), the Supreme Court said: "An appellate court should not confidently guess what defendant's attorney might have found useful for impeachment purposes in withheld documents to which the defense is entitled." The question whether the "defense is entitled" to the production of a given statement is reserved for the determination of the district court. Thus, "when it is doubtful whether the pro-

[8]At the hearing, Government counsel tendered the October 8 statement in response to a defense request for the "3500 statements of the witness [Connors]."

duction of a particular statement is compelled by the statute, we approve the practice of having the Government submit the statement to the trial judge for an *in camera* determination." *Palermo* v. *United States*, 360 U.S. 343, 354 (1959).

Both the *Rosenberg* and *Palermo* cases make clear that the Supreme Court viewed the district court, not Government counsel, as the arbiter of whether statements are producible under 18 U.S.C. § 3500. By refusing to admit that agent Connors had prepared any reports, the Government unilaterally usurped the district court's function in this regard. *Bary* v. *United States*, 292 F.2d 53, 58 (10th Cir. 1961). Irrespective of how the district court might have resolved the issue whether the reports in question were within the purview of 18 U.S.C. § 3500, it was improper and prejudicial[9] for the Government to preclude the court from ever reaching such a resolution.

I am likewise unconvinced by the majority's discussion of the defendants' contention that the Government's willful suppression of the three reports violated their rights to due process. In *Brady* v. *Maryland*, 373 U.S. 83, 87 (1963), the Supreme Court said, "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." I have already sought to demonstrate that the three reports were relevant and material to the defense. Thus, the willful suppression of these reports by the Government, standing alone, would seem to lead to the conclusion that the defendants' due

[9]As the defendants argue in their brief, if the defense counsel were aware that agent Connors both had knowledge of Hyman's proposed defense and had deliberately changed his work sheets and accounting analysis after gaining such knowledge, agent Connors' testimony might have been seriously impeached.

process rights were violated. This conclusion is strengthened when the fact that agent Connors lied on the witness stand is also considered. Although agent Connors emphatically denied at the trial that he had made any reports during his investigation, he had in fact prepared and circulated the three reports in question, as he admitted at the hearing.

III.

In its per curiam opinion, the Supreme Court remanded this cause to the district court to consider "any other electronically eavesdropped conversations." *Hoffa* v. *United States*, 387 U.S. at 233. Despite this explicit direction, the district court refused the request of the defendants for the production by the Government of all logs and reports of eavesdropped conversations of defense counsel. The Government took the position with regard to these requests that it was required to disclose only those eavesdropped conversations in which a defendant participated.[10] The Government's position was reiterated in its brief filed in this court. In response to a question from this court during the oral argument, Government counsel admitted that the Government possessed logs of eavesdropped conversations of certain defense attorneys. At the conclusion of the oral argument, Government counsel left

[10] Government counsel made the following statement to the district court:

> Your Honor, the Government has made it plain in its memorandum in this case and its memorandum before the Supreme Court of the United States what the Government's disclosure policy is.
>
> It is to disclose all arguably relevant materials which have thus obtained from conversations of defendant. That goes far beyond any legal requirements that are imposed upon the Government.

A116

with the Clerk of this court an envelope containing these logs, with instructions that the contents be made available only for the use of the court.

Two observations are in order with respect to the manner of the Government's disclosure of the logs of overheard conversations of the defense counsel. First, the Government's narrow and cavalier response to the Supreme Court's broad direction ought not to be condoned. Second, for reasons similar to those I expressed in my dissent in *United States* v. *Battaglia,* Nos. 16312, 16313, decided April 10, 1968 on motion to remand, I believe that it is improper for this court to initially examine these logs, whether *in camera* or not, to determine their relevancy to the issues in this case.

IV.

With regard to certain issues raised by the defendants in the original appeal in this case and reasserted by them in the present appeal, I adhere to both the reasoning and the suggested disposition expressed in my dissent in the original appeal. *United States* v. *Hoffa,* 367 F.2d 698, 716 (7th Cir. 1966).

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX G

UNITED STATES COURT OF APPEALS
For The Seventh Circuit
Chicago, Illinois 60604

Thursday, August 15, 1968

Before

Hon. LATHAM CASTLE, *Chief Judge*

Hon. F. RYAN DUFFY, *Senior Circuit Judge*

Hon. LUTHER M. SWYGERT, *Circuit Judge*

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. JAMES R. HOFFA, et al., *Defendants-Appellants.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

No. 16634

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby AFFIRMED, in accordance with the opinion of this Court filed this day.

APPENDIX H

UNITED STATES COURT OF APPEALS
For The Seventh Circuit
Chicago, Illinois 60604

Thursday, November 7, 1968

Before

Hon. LATHAM CASTLE, *Chief Judge*

Hon. F. RYAN DUFFY, *Senior Circuit Judge*

Hon. LUTHER M. SWYGERT, *Circuit Judge*

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. S. GEORGE BURRIS, et al., *Defendants-Appellants.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

IT IS ORDERED BY THE COURT that the petitions for a rehearing of this cause be, and the same are hereby, DENIED.

SUPREME COURT, U. S.

JAN 8 1969

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 911

BENJAMIN DRANOW,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent

Petition for A Writ of Certiorari To the United States Court of Appeals for the Seventh Circuit

FRANK RAGANO
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Tampa, Florida, 33602
Counsel for Petitioner.

FREE PRESS PUB. CO., INC., TAMPA, FLORIDA

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. .....

BENJAMIN DRANOW,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent

Petition for A Writ of Certiorari To the United States Court of Appeals for the Seventh Circuit

---

Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this cause on August 15, 1968.

OPINIONS BELOW

of Appeals appear at 367 F.2d 698. The District Court's opinion on remand by this Court is reported at 273 F.Supp. 141. The majority and dissenting opinions of the Court of Appeals on the instant appeal are not yet reported. All opinions have been printed in the appendix of the petition, filed, contemporaneously with this petition,

by the remaining defendants-appellants in the Court below, who are named herein, and which this petition adopts.

JURISDICTION

The judgment of the Court of Appeals was entered on August 15, 1968. A timely petition for rehearing was denied on November 7, 1968. On November 26, 1968, Mr. Chief Justice Warren extended the time for the filing of a petition for a writ of certiorari to January 6, 1969. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

STATEMENT

In the interest of expediency, of economy and for the benefit of this Court, this petitioner adopts, as fully as if set forth herein, the Statement contained in the Petition for a Writ of Certiorari To the United States Court of Appeals for the Seventh Circuit, which is being filed contemporaneously with this Petition by Petitioners James R. Hoffa, Zachary A. Strate, Jr., S. George Burris, Abe I. Weinblatt and Calvin Kovens, wherein the United States of America is also the respondent.

This petitioner, in addition to the statement of the above named petitioners, which he has adopted, sets forth the additional pertinent facts applicable to the question that he presents by this petition, which is not presented by the petition of the remaining petitioners. "H.D.A." references are to the pages of the appendix for defendants-appellants filed in the Court of Appeals in the second appeal, No. 16634.

From the very inception of the pretrial proceedings, in 1963, irrational conduct by petitioner Dranow was brought to the Court's attention. At arraignment, he would not enter a plea. (H.D.A. p. 461). On June 25, 1963, his attorney informed the Court of Dranow's complaint of a visit to him in prison by Justice Department agents requesting him to give perjured testimony at the trial. Counsel stated that Dranow "is virtually half insane." (H.D.A. p. 462). Even Government counsel early informed the Court that the Government feared a conflict might arise between Dranow and his counsel (H.D.A. 463-465).

In late March, 1964, the Court received a letter from Dranow, who was then in prison at Leavenworth, Kansas complaining of his physical condition. (H.D.A. 474). In early April, 1964, Dranow was transferred to Chicago for the impending trial. Due to Dranow's physical condition, he was later transferred to a jail with more satisfactory facilities (H.D.A. 476).

Prior to commencement of trial, on April 27, 1964, counsel informed the court that: (1) Dranow had been unable to confer intelligently with counsel; (2) Dranow had informed them that he was not physically or mentally capable of aiding and assisting in the preparation of his defense; (3) Dranow could not speak coherently; and (4) they were of the belief that Dranow could not intelligently aid and assist counsel in the preparation of his defense. They requested that the Court have Dranow examined by doctors to determine "whether or not he is mentally capable of assisting counsel in the preparation of this case." (H.D.A. 493).

Government counsel requested that, if formal papers were filed showing sufficient basis for the Court

to order a hearing, the Government then be afforded an opportunity to have Dranow examined by doctors selected by the Government. The Government also suggested that the Court select an impartial psychiatrist to act in the matter. (H.D.A. 498). Dranow's counsel requested that the Court, on its own motion, have Dranow examined. Dranow's counsel stated that they hoped to secure written reports from doctors who had examined and treated Dranow. (H.D.A. 499). During this conference, Dranow's counsel told the Court that a doctor who had attended Dranow had indicated to him by telephone that Dranow had a "very serious mental aberration" as well as "many, many things wrong with him physically" (H.D.A. 500), and that he "is in a very, very serious condition both mentally and physically." The Court did not select a doctor, but suggested that the Government and defense have Dranow examined.

At this conference, Dranow's counsel also told the Court that Dranow had vacillated on whether he wanted them to represent him, and requested that the Court determine from Dranow whether he desired that they continue to represent him. Dranow was brought into chambers and, in response to a direct question, stated that it was satisfactory for Ragano and Schiffer to continue their representation (H.D.A. 502).

The next day, April 28, 1964, the Government, pursuant to oral motion by Dranow's counsel on the previous day, submitted to the Court a proposed order to appoint three doctors selected by the Government to examine Dranow on the following day. Dranow's counsel requested that the examination be deferred until after reports had been received from the doctors who had previously examined and treated Dranow.

At this conference in chambers, Dranow's statements and conduct were not only irrational, but he also exhibited an unwillingness to cooperate with his counsel. Dranow refused to be examined in a hospital (H.D.A. 508).

Dranow imagined that the doctors were putting needles in him and that, "The prisons took a hundred needles out of me" (H.D.A. 513). Dranow's counsel at that time, Mr. Schiffer, advised the Court that Dranow did not understand much of what was said to him. (H.D.A. 513). Even at the first trial the Petitioner sent a telegram to the Court choosing to be his own lawyer. Yet when called into chambers he responded to the Court's questioning that he desired to proceed with this counsel (H.D.A. 532, 533).

This petitioner took the witness stand at the original trial and testified against the advice of his counsel and that of counsel for other defendants (H.D.A. 536, 537). Thereafter his conduct on the stand demonstrated his incompetency (H.D.A. 537 through 584).

Since the date of the original trial, Dranow's mental condition has deteriorated. The medical records at the Medical Center for Federal Prisoners at Springfield, Missouri, reflected that Mr. Dranow had been in solitary confinement in the psychiatric ward at that facility for approximately ten and one half months prior to the hearing which is now the subject of this appeal (H.D.A. 679).

In December 1966, Doctor Hildreth, the staff psychiatrist of the above described government medical center, felt that Dranow was "a paranoid personality characterized by extreme sensitivity in interpersonal

relationships, a conspicuous tendency to use the projection mechanism and avoidance of close relationships with others" (H.D.A. 190). These same records note that on March 17, 1967, Dranow was noted to be very grandiose, loud, emotionally labile, and paranoid. A psychiatrist was asked to see him immediately.

These records, in the "Discharge Impressions" contained a finding that Dranow suffered from "chronic paranoid schizophrenia with depressive and paranoid features." (H.D.A. 191). This impression was dated April 4, 1967.

On May 9, 1967, the progress notes of Doctor Hildreth contains the entry that, "Mr. Dranow exhibits many gross disturbances of thought . . . , often makes up words in substitution for real words. Often his thoughts are difficult to follow since there seems to be no logical sequence. He is acusatory and bombastic, accuses the physician of persecuting him. He still is generally hyperactive and extremely angry. Grossly psychotic at this time." (H.D.A. 197).

On May 12, 1967, the same Doctor Hildreth expressed the opinion that Dranow was "grossly psychotic and becoming increasingly withdrawn as time goes along." (H.D.A. 197).

Doctor Joseph F. Alderete, Chief, Psychiatric Service, on April 26, 1967 diagnosed Dranow as "borderline schizophrenic reaction, paranoid type, of a chronic nature, of mild to moderate severity." (H.D.A. 196).

At the hearing on July 25, 1967, Doctor John R. Adams testified concerning the appellants mental condition. Doctor Adams' qualifications are set forth on

pages 201 through 206 of the Appendix for Defendants-Appellants. He was a Fellow, The Menninger Foundation School of Psychiatry, Topeka, Kansas, 1946-1949. In addition to many other honors he holds the position of Chief, Neuropsychiatric Service, Passavant Memorial Hospital, Chicago, and has held this position since 1954. He has been with the Northwestern University Medical School, Department of Neurology and Psychiatry since 1954 and is a full Professor with that school at this time. He is certified by the American Board of Neurology and Psychiatry in Psychiatry. He has had numerous publications.

Doctor Kesert, who testified for the government, recognized Doctor Adams as a reputable psychiatrist (H.D.A. 687). Doctor Adams testified, in part:

> "A. In the sense that Mr. Dranow's responses to and reactions to the situation about him are dominantly governed by the mood, by the pathologically depressed mood, it would follow that he, in many instances, would not respond with good and prudent judgment, would not necessarily respond logically, because the responses are determined essentially by the mood.
>
> Q. All right, Doctor. Let me ask you this: Have you an opinion, based on a reasonable medical certainty, and based upon your examination of Mr. Benjamin Dranow and Defendant's Exhibits 1-A, 1-B and 1-C, as to whether or not Mr. Dranow was capable of cooperating with counsel in this case?
>
> A. By his own statement to me, he had no interest in cooperating with counsel. I feel that he is not able to. Part of the reason for that is the fact that the person severely depressed is self-deprecatory and usually is self-destructive. It would follow from this that a tendency to not cooperate,

even though it be to his own disinterest, would be completely consistent with his pathological condition.

Q. Based upon your examination of Mr. Dranow and Defendant's Exhibits 1-A, 1-B and 1-C, would you say that he understands the nature — do you have an opinion as to whether or not he understands the nature of these proceedings.

A. It was my distinct impression during my conversation with him that he was not clear as to the precise technical nature of these proceedings. It was my impression that he viewed the activity as though it were a trial — it was not possible to elicit a full and extensive response, but it was distinctly my impression that he was not accurately perceptive of this proceeding." (H.D.A. 764, 765)

Doctor Adams further stated, upon questioning by the Court:

"The Witness: Certainly I saw many evidences of paranoid symptoms. To me the degree of incapacity is reflected in the depression.

Now, this is still consistent, because profound depression certainly is a frequent finding in paranoid schizophrenia. I saw nothing that was in opposition to the conclusions reached in Springfield.

The Court: But because of the insufficiency of your examination, you didn't feel qualified to make a diagnosis, is that it?

The Witness: I would have called him, as he was most recently called in the records here, psychotic depression." (H.D.A. 770)

Doctor B. Cullen Burris also testified concerning Mr. Dranow's condition. His qualifications are set forth on pages 207 through 210. He also has board certification from the American Board of Psychiatry.

Doctor Burris testified that he examined Mr. Dranow on July 24, 1967 and that Dranow was suffering from a severe depression (H.D.A. 775), and that he did not feel that, "Mr. Dranow is capable of cooperating with counsel." (H.D.A. 776).

Doctor Melvin N. Seglin, whose qualifications are set forth on pages 213-214, which includes being a Diplomate, American Board of Psychiatry and Neurology, testified that, "I feel fairly certain that he (Dranow) is unable to cooperate with counsel." (H.D.A. 779; See also 210-213).

Opposel to these eminent psychiatrists was the opinion of Doctor Benjamin Kesert, who is not "board certified" in psychiatry (H.D.A. 706), who had been employed by the government for some thirty years (H.D.A. 676) and who is drawing a government pension (H.D.A. 676). It is further noted that Doctor Kesert has a history of being, at the least, flexible. On December 6, 1965, he wrote to the United States Attorney that another defendant he had examined, a William Bass, was mentally capable of understanding the charges against him. On October 11, 1965, only two months earlier, he had written concerning the same patient:

> "The psychiatric picture that the patient presents leads me to conclude that he has a condition that can best be classified as chronic schizophrenic reaction. He has been in trouble through the years and is leading a more or less vegetative existence. It is amazing he still has competent people running his business in which he does not participate and draws a fairly good salary.
>
> "I believe he cannot understand the charges against him and would not be able to cooperate with counsel in his defense of the charges preferred against him by the Government." (H.D.A. 709)

QUESTIONS PRESENTED

This petitioner adopts the questions presented for review by the remaining petitioners named above and the argument presented by those petitioners for the allowance of the writ. In addition, this petitioner presents the following question and argument thereon.

CAN A CRIMINAL CONVICTION STAND WHERE THE DEFENDANT WAS NOT MENTALLY COMPETENT TO UNDERSTAND THE NATURE OF THE PROCEEDING AND WAS UNABLE TO ASSIST HIS COUNSEL?

ARGUMENT

"It is fundamental that an insane person can neither plead to an arraignment, be subjected to a trial, or, after trial, receive judgment, or, after judgment, undergo punishment." *Youtsey v. United States,* 97 F.937, 6th Cir., (1899).

There is no doubt that the standard for competency to stand trial is not necessarily the same as the standard of competency required to be held responsible for the commission of the act charged. However, the standard is not met by a mere showing that the appellant is oriented as to time and place and has some recollection of events. The test must be, "whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding — and whether he has a rational as well as factual understanding of the proceedings against him." *Dusky v. United States,* 80 S. Ct. 788, 362 U.S. 402, 4 L.ed 2d 824.

The test delineated above, when applied to the condition of Benjamin Dranow, reflects that Mr. Dranow fails the test on every count. Both counsel for Dranow,

Mr. Schiffer and Mr. Ragano, repeatedly expressed their inability to intelligently consult with Dranow. The record of the original trial, with Dranow's many outbursts, reflects his counsel's difficulty in controlling Dranow and keeping his answers intelligible. Dranow's conduct during the trial and the subsequent "bugging" hearing; his record at the Medical Center for Federal Pisoners, Springfield, Missouri; the opinions of qualified psychiatrists at this federal faculty; plus the opinions of three eminent psychiatrists from the Chicago area, all establish the almost irrefutable conclusion that Mr. Dranow did not have sufficient present ability to consult with his lawyer within a reasonable degree of rational understanding and that he did not have a rational as well as factual understanding of the proceedings against him.

The sole support to the Court's holding that Dranow was capable of proceeding with the hearing is found in the testimony of Doctor Kesert. It is interesting to note that Doctor Kesert was not certain himself of the nature of the proceedings (H.D.A. 671-675) and, therefore, it is submitted that his opinion should carry little weight. As compared to the many eminent psychiatrists who testified and whose reports reflect that Dranow was not mentally competent, Dr. Kesert is found to be not "board certified" in psychiatry; has been employed by the government for some 30 years; and is presently drawing a government pension. Dr. Kesert's examination, as compared to the extensive time that Mr. Dranow was subject to observations at the federal facility, was brief (H.D.A. 676). Counsel for Dranow, Frank Ragano and Jacques Schiffer, both testified at the hearing that Dranow was not capable of cooperating and did not comprehend the significance of the proceedings (H.D.A. 1536). Although no other lay

witnesses testified, all counsel for the co-defendants expressed their unqualified opinions throughout that Dranow was not capable of assisting counsel.

The Court's finding that this appellant was capable of assisting counsel and proceeding with the hearing which is the subject of this appeal was erroneous as not being based upon "substantial" testimony. *United States v. Westerhausen,* 7th Cir. 283 F.2d 844 (1960).

Even though a defendant is able to give an account of the circumstances surrounding his offense, if his thinking is colored by insane delusion or ever severe *depression,* he may be incompetent to assist in his defense. See "Psychiatric Examinations in Federal Mental Competency Proceedings" by Charles E. Smith, M. D., Medical Director, Federal Bureau of Prisons, 7 F.R.D. 171, 174. Dranow's history is replete with his sufferings from severe depression before and at the time of the hearing involved.

The findings of the trial court on this issue, we submit even reaches such heights as to "shock the conscience". See *Holloway v. United States,* D.C. Cir., 148 F.2d 665 (1945). The total proof, when all considered together, does far more than leave a reasonable doubt of Dranow's sanity at the time of this hearing.

CONCLUSION

For the foregoing reasons this petition should be granted.

Respectfully submitted,

FRANK RAGANO
Attorney for petitioner
Benjamin Dranow
416 Pierce Street
Tampa, Florida 33602

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petition has been mailed this 3rd day of January, 1969 to the Solicitor General, Department of Justice, Washington, D. C. 20530 and to Fred M. Vinson, Jr., Assistant General, Department of Justice, Washington, D. C.

FRANK RAGANO
416 Pierce Street
Tampa, Florida, 33602

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1070

SAMUEL JOSEPH GIORDANO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

Petitioner and a co-defendant, Eugene Ellsworth Ayotte, were convicted in the United States District Court for the Eastern District of Michigan of concealment of assets of a bankrupt estate and conspiracy to conceal such assets, in violation of 18 U.S.C. 152 and 371, respectively. The court of appeals affirmed on December 4, 1967 (Pet. App. 31-39). Petitioner alone filed a petition for a writ of certiorari on January 31, 1968.

We advise the Court that a conversation of petitioner was overheard by means of an electronic device

which was installed by a trespass upon a commercial establishment owned by one of his acquaintances who was believed to be engaged in organized criminal activity.* Under the *per curiam* opinion in *Kolod et al.* v. *United States*, No. 133, decided January 29, 1968, this case should be remanded to the district court for further proceedings. As set forth in the motion for modification submitted in *Kolod et al.* v. *United States* No. 133, we believe that the order of remand should provide that the record of electronic surveillance be submitted for *in camera* inspection to the district judge, who may then direct such further proceedings as he finds warranted.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

FEBRUARY 1968.

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* Co-defendant Ayotte, who is presently incarcerated on another conviction, will be promptly notified of the above facts through his counsel.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1968 291131 607

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1290

MICHAEL J. SCANDIFIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on January 31, 1968. A petition for rehearing was denied on March 5, 1968. The petition for a writ of certiorari was filed on April 4, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence is sufficient to sustain the conviction.

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2. Whether there was plain error in the instructions.

3. Whether evidentiary rulings by the trial court were proper.

4. Whether petitioner was denied a speedy trial because of the lapse of time between the offense and the return of the indictment.

STATEMENT

Petitioner was convicted in the United States District Court for the Southern District of New York on nine counts of an indictment charging him with wilfully causing the interstate transportation of counterfeit securities in violation of 18 U.S.C. 2314. He was sentenced to concurrent terms of six years' imprisonment on each count. The court of appeals affirmed the conviction.

The evidence is summarized in the opinion of the court of appeals. It shows that the offenses arose out of a scheme whereby petitioner induced various persons, principally investors in the Hersch Trading Company, to pledge petitioner's counterfeit Shell Union Oil bonds, for short terms loans. The sequence of events began in October 1960, when Leon Hersch and Irving Cohen, two of the partners in the Trading Company, were pressed by investors to obtain repayments from Morton Rosenberg, the third partner (R. 6–13). Hersch hired petitioner to collect what Rosenberg owed (R. 14). When petitioner's effort to collect money from Rosenberg proved fruitless, petitioner, at a meeting of the investors at Hersch's New Jersey home, displayed the Shell bonds and suggested that he had another

way for them to get a return (R. 14–15, 348–350, 474–476, 500). Subsequently, at a New York restaurant, petitioner revealed his plan to Hersch. Petitioner said that the investors could use the bonds to obtain loans, providing they returned to petitioner 60 percent of the face value of the bonds. Petitioner said that the loans could be repaid in six months when he collected from Rosenberg. After Hersch took two of the bonds to a nearby bank and found them acceptable as collateral, he agreed to participate in the plan (R. 15–18).

On November 9, Hersch secured some Shell bonds from petitioner at the latter's Brooklyn garage and delivered them to an investor who used them as collateral for a loan at a Brooklyn bank (R. 19–20). Thereafter during November, petitioner, in Brooklyn, gave Hersch additional bonds for distribution to Aaron Starr, Leonard Ledwitz and Sam Serkin, investors who lived in New Jersey. Two of these investors had previously met petitioner at Hersch's home. Starr and Ledwitz then used these bonds as collateral to obtain loans from banks (R. 25–34). When Serkin was unable to negotiate a satisfactory loan, the bonds delivered to him were used by Solomon Rabstein to obtain a loan (R. 35–40). On November 25, Rabstein took 100 of the bonds to the printer of the genuine bonds and discovered they were false (R. 41–42). When Rabstein threatened to go to the police, petitioner gave back his share of the Rabstein loan so that the bonds which the latter had pledged could be redeemed. After Hersch secured possession of these bonds, petitioner told him to come to

New York and return the bonds to him (R. 43–49). On November 30, Ledwitz returned 32 bonds to petitioner at a meeting of investors at Hersch's home. Upon leaving, petitioner said he was going to New York to communicate with the people who gave him the bonds (R. 50–57, 207, 360–365). In the course of these transactions, Hersch transported bonds from New York to New Jersey, and he and some of the investors also transported bonds back to New York.[1] In all, counterfeit bonds having a face value of $410,000 were pledged and petitioner received over $168,000 as his share of the loans obtained (Pet. App. A5).

ARGUMENT

1. The claim that the evidence was insufficient to show that petitioner caused the interstate transportation of counterfeit bonds is refuted by the record. As the court of appeals pointed out with reference to count ten, there was evidence that petitioner specifically told Hersch to come to New York and give him the bonds which Rabstein had redeemed from the New Jersey bank after discovering that they were counterfeit (R. 49). As to count eleven, evidence that petitioner left the New Jersey meeting on November 30, 1960, with bonds in his possession, after stating that he was going to New York to contact the people who gave him the bonds (R. 56–57, 207, 364–365), warranted an inference that petitioner himself transported these bonds in interstate commerce. As to the

[1] Other counterfeit bonds were pledged and distributed to other investors by Hersch's partner, Irving Cohen (*e.g.*, R. 170–172, 180–185).

other counts, when petitioner gave the bonds to Hersch, a New Jersey resident, to deliver to other New Jersey residents, he could reasonably have foreseen that the bonds would be taken across state lines. See *Pereira* v. *United States,* 347 U.S. 1, 8–9. Since petitioner received a concurrent sentence on all of the counts, the judgment was properly affirmed if the evidence was sufficient to support the conviction on any count. *Lawn* v. *United States,* 355 U.S. 339, 362.

The district court had charged, in accordance with prior rulings by the Second Circuit,[2] that the jury could find that petitioner caused the interstate transportation of the bonds if he turned them over to Hersch "without limitation as to where they were to be transported, and if in fact thereafter the bonds were transported in interstate commerce" (R. 796). Petitioner did not object to these instructions. The opinion below has narrowed the concept of causation to reasonable foreseeability. Since, however, the evidence that the jury necessarily must have credited showed that petitioner, in dealing with a group of New Jersey investors, could reasonably foresee the transportation of the bonds and did in fact participate in the interstate transportation of some, the court below properly declined to reverse the conviction.

2. It was not error for the court to fail to give a cautionary instruction on accomplice testimony. Even if Hersch and Cohen may properly be characterized as accomplices, the government's case did not rest

---

[2] See *United States* v. *Tannuzzo,* 174 F. 2d 177 (C.A. 2), certiorari denied, 338 U.S. 815.

upon their testimony. There was amply corroborating testimony from other witnesses, such as Rabstein from whom petitioner forcibly retrieved 100 bonds after Rabstein discovered that the bonds were spurious (R. 547–550). In these circumstances, the claim of prejudice has no substance. See *Barnes* v. *United States,* 347 F. 2d 925, 927–928 (C.A. 8).

3. (a). Defense counsel, in cross-examining Cohen, brought out the fact that on December 20, 1960, Cohen had informed the F.B.I. that he had obtained the bonds from a "Mr. Schweikert" and that Schweikert was not petitioner (R. 222–231). On redirect examination, Cohen explained that he had falsely named this source because his family had received threatening telephone calls and because of "fear of my family's life knowing Mr. Scandifia's background" (R. 236–238). The trial judge properly permitted the witness to explain his prior inconsistent statement that petitioner was not the source of the bonds. The judge properly dealt with reference to petitioner's "background" by the prompt instruction to disregard this portion of the testimony of the witness.

(b). Petitioner in his own defense denied that he had ever had possession of the counterfeit bonds or anything to do with the bonds (R. 624–627). On cross-examination, the prosecutor asked petitioner whether he had given 100 counterfeit IT&T bonds to a Mr. Ezrine. Petitioner replied "Was I convicted? Was it proven yet?" The court, thereafter, denied petitioner's request for a mistrial but told the jury to disregard the question, instructing them that questions of counsel were not evidence (R. 667–668). Again, the court's

action in denying a mistrial was a proper exercise of its discretion. Petitioner's testimony that he had never had any dealings in the bonds may have opened the door to the prosecutor's question. In any event, there is no occasion for further review of the court's discretion in denying a mistrial and instructing the jury not to consider this question.

4. There is no legal basis for the contention that petitioner was denied a speedy trial because of a lapse of time between the commission of the offense and the return of the indictment, a period governed by the statute of limitations. See *United States* v. *Simmons,* 338 F. 2d 804, 806 (C.A. 2), certiorari denied, 380 U.S. 983. Moreover, this contention was not raised in either the district court or the court of appeals and is, therefore, not reviewable in the absence of exceptional circumstances. See *Lawn* v. *United States,* 355 U.S. 339, 362, n. 16. There is nothing in this record either to show such circumstances or to support the claim that evidence might have become unavailable by the passage of time.

For the reasons stated above, we believe that the petition for a writ of certiorari presents no question warranting review by this Court. We have the duty, however, to advise the Court that on one occasion, after this offense had been consummated but before indictment, petitioner was overheard by an electronic device installed by trespass in a commercial establishment owned by another, talking about a matter totally unrelated to the instant case. We propose to make a disclosure to the district court in accordance with the

procedure which this Court prescribes in *Kolod* v. *United States*, No. 133, this Term, pending on the government's motion to modify. In view of the utter irrelevancy of this single overhearing, we suggest that, in order not to delay the final disposition of this case, it would be appropriate for the Court to rule on the certiorari petition on the basis of the questions raised rather than to grant the petition on the basis of the overhearing. A ruling denying certiorari would be without prejudice to further proceedings in light of this Court's decision in *Kolod* v. *United States*.[3]

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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MAY 1968.

[3] A remand is, of course, unnecessary to confer jurisdiction upon the district court. Since the evidence of the electronic surveillance is newly discovered, the district court could grant a new trial if it found that there were any grounds therefor. Rule 33, F. Rules Crim. Proc.

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308-914—68——1

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1420

JOHN FRANZESE, A/K/A/ "SONNY", ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on March 25, 1968. On April 19, 1968, Mr. Justice Harlan extended the time for filing a petition for a writ of certiorari to May 24, 1968, and on May 10, 1968, the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in the circumstances of this case, redirect examination of government witnesses who had

been impeached by prior inconsistent statements was proper to permit them to explain that their failure to inculpate petitioners in the prior statements was due to fear.

2. Whether there was a prejudicial variance between the proof and the indictment.

3. Whether the evidence showed an improper "deal" with certain government witnesses, necessitating reversal of the convictions.

4. Whether the trial court's refusal to require disclosure of an informant's identity was justified on the facts of this case.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of New York, petitioners were convicted on various counts charging conspiracy to rob federally insured banks, receiving the proceeds of bank robberies, and aiding and abetting the commission of bank robberies in which lives were placed in jeopardy. See Pet. App. A, p. A3, fn. 2. Petitioner Franzese was sentenced to a total of fifty years' imprisonment and was fined $20,000; petitioners Florio and Potere were each sentenced to a total of fifteen years' imprisonment; petitioners Matera and Crabbe were each sentenced to five-year prison terms. The court of appeals affirmed (Pet. App. A).

As the court of appeals indicated, the government's evidence, the sufficiency of which is not challenged, "rested almost entirely on the testimony of four confessed participants—Smith, Parks, Cordero and

Zaher—who cast [petitioners] in the role of behind-the-scenes operators of a nationwide bank robbery business" (Pet. App. A, pp. A3–A4). This testimony, which the court found to be "exceedingly detailed and circumstantial—indeed therein lay its strength" (Pet. App. A, p. A5), showed the following.

On July 19, 1965, the four witnesses, who were dissatisfied with their leadership by one Polisi, were summoned to a meeting [1] at the Aqueduct Motel Inn in Queens, New York, which was owned and operated by Polisi (R. 73–79, 1458, 1783–1784, 2371–2372).[2] Present were Polisi and all petitioners except Potere. The four stated that they were dissatisfied with the way Polisi had handled two prior robberies. Franzese announced that he was taking over the operation and that work orders would be issued by the others in the room. He indicated the split would be fifty-fifty (R. 2372–2373, 2571). Petitioner Matera added that the arrangements included money for bail and for lawyers in the event of arrest, as well as money for the robbers' families if they had to serve prison terms. He warned that "ratting on anybody is out of the question * * * because we will get you" (R. 83–84, 2373–2374, 2572). Franzese then confirmed the understanding regarding money in the event of arrest or jail sentence and said he would see to it that the robbers' money

[1] We have simplified the account of this meeting (as did the court of appeals) to reflect the situation as though all four witnesses were always in the room. In fact, no more than two of the four robbers conferred with the others at any one time.

[2] "R." refers to the record of proceedings in the district court, on file with the Clerk of this Court.

was invested in legitimate business. He described the extent of his services as including the theft of cars to be used in the robberies (R. 1458–1460, 1785–1786). Petitioner Florio told Smith and Parks that Potere also was involved in the scheme (R. 2376–2377, 2573).

A few days later, Cordero met with petitioners Florio, Franzese and Potere at Potere's apartment (R. 1793–1795). Franzese announced that he had the plans for five banks. He reiterated that the split would be fifty-fifty (*i.e.*, fifty percent to the robbers and fifty percent to himself and the others) and that there would be money for bail, lawyers and family in case the robbers were caught. (R. 1796–1797). Later that night, pursuant to Franzese's direction, the plans were shown to Parks, Smith, and Polisi at the Aqueduct Motor Inn.[3] The banks were reconnoitered the following morning and subsequently the bank-robber trio (Parks, Smith and Cordero) were introduced to the get-away driver, Anne Messineo (R. 97–106, 1800–1810, 2378–2386, 2578–2581). On July 30, 1965, the trio (with Anne Messineo acting as driver) robbed the Queens County Federal Savings and Loan Association of $12,000 using guns supplied by Florio and Polisi (R. 109–110, 119–122, 1810–1812, 2389, 2586). On August 13, 1965, the trio, again using guns and with Anne Messineo as driver of the get-away car, robbed the United States Savings and Loan Association in Oceanside, Long Island of $16,400 (R. 131–135, 1864–1869,

[3] Zaher, in the interim, had left the area, having been advised by the other three robbers that Polisi wanted him killed (R. 1541–1543, 1788–1792).

2405–2409, 2596–2598).[4] On August 31, 1965, the trio committed armed robbery of the Holyoke National Bank in Chicopee, Massachusetts, netting $17,000 (R. 153–156, 475–496, 1894–1898, 2174–2180, 2469–2472, 2630–2634).

Early in September 1965, Franzese directed the trio to rob banks in Denver and Salt Lake City. The Denver bank was to be robbed on Friday, September 10. Franzese instructed Smith to take along his girl friend, Carol Scalzo,[5] and Cordero to take his wife. Petitioner Crabbe asked to accompany the group, but Franzese refused, stating that Crabbe was needed at home (R. 164, 1901–1903). The group arrived in Denver a day behind schedule. On Saturday, September 11, 1965, the trio robbed the Denver bank of $300. Two days later they robbed the Salt Lake City bank of $33,000 and some travelers checks (R. 161–168, 1905–1909, 2180–2200, 2537–2541). After returning to New York the trio, at a meeting with petitioners Franzese, Florio, Crabbe and Matera, offered Franzese $6,000 plus the travelers checks as his share. Franzese accepted but warned: "From now on it is going to be fifty-fifty" (R. 171–178, 1910–1915, 2542–2546).

There was talk later of "work" for the trio in California and of a planned armored truck robbery (R. 1915–1916, 2547). During the last week in September, banks in Brooklyn and Long Island were surveyed (R. 2548–2555). On September 30, 1965, Parks

[4] Shortly following each robbery, the guns were returned, and the money divided, at the Aqueduct Motor Inn.

[5] Miss Scalzo had accompanied the trio to Massachusetts and had aided in the Chicopee robbery, as had Polisi's son.

and Smith were arrested. Cordero was apprehended on October 1, 1965. Zaher, who had returned, was arrested on October 8, 1965 (R. 284–285, 1462–1464, 1935–1937).

After the arrest of Parks, Zaher took Parks' sister to see Polisi with regard to bail arrangements. Polisi said he was not making such arrangements. He gave Zaher $200 and told him to "stay away" (R. 1464–1465, 1473). The lawyers who represented Parks and Cordero following their arrest testified that they received approximately $1,100 from Potere for Parks and $960 from Potere for Cordero, to be used primarily for attorneys' fees and bail[6] (R. 2645–2648, 2701–2718, 2782–2786, 2796–2797; see R. 3133–3135).

No defense testimony was offered on behalf of any petitioner other than Matera, whose wife and others gave alibi evidence that he was at a resort in the Poconos from July 17 to July 24, 1965. See Pet. App. A, p. A8. Petitioners' defense was chiefly aimed at attacking the credibility of the four principal government witnesses, Parks, Smith, Cordero and Zaher. To this end, petitioners cross-examined each of these witnesses with respect to prior inconsistent statements which failed to mention petitioners' role in the bank robbery organization, with respect to their prior criminal records, and with respect to letters and other facts allegedly showing an improper inducement for their testimony.

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[6] $500 of Cordero's money was for his wife.

ARGUMENT

1. Petitioners contend that it was error in the circumstances of this case to permit the prosecution to "rehabilitate" the government's witnesses through redirect examination enabling the witnesses to explain the reason for their prior inconsistent statements. In considering this claim, it will suffice to recount the facts with respect to the government's lead witness, Smith, since the testimony of the other witnesses involved similar procedures and statements.

In statements to the F.B.I. on October 14, 1965, and in testimony at the trial of Polisi and his son in January 1966, Smith had inculpated Polisi and had thrust on him the role of leader, without mentioning the participation of petitioners.[7] In March 1966, Smith implicated petitioners before the federal grand jury which returned the present indictment. At that time he was asked why he had not previously disclosed information of petitioners' participation in the scheme. He answered (Pet. App. A, p. A9):

> "Because, as far as I was concerned, I was ready to go and take my just punishment. They would look out for my family and put up the bail money, and try and get me back out. And they didn't do it. And I felt I didn't owe them nothing no more."

Petitioners' counsel were furnished Smith's previous statements before their cross-examination. They cross-

[7] As the court of appeals pointed out, Polisi had in fact been the leader of the bank robbery enterprise prior to the July 19, 1965, meeting at which Franzese took over. Two of the three robberies for which Polisi was tried occurred in the period of his leadership (Pet. App. A, p. A5, fn. 4).

examined him extensively concerning his prior failure to allude to petitioners' involvement in the crimes.

Following Smith's cross-examination, the prosecutor advised the court that he proposed to show on redirect examination that Smith's silence as to petitioners was due to fear. After weekend research, the trial judge announced his tentative conclusion that a "witness may describe what his fears are and what they are based on" even if they "happen to point to a crime." However, he indicated that he would "exclude any other matter that * * * will lead the jury away from these issues and in effect decide the character or other crimes of these defendants" (R. 810). After further discussion, it was decided to hold a preliminary hearing outside the presence of the jury at which Smith would explain the basis of his fears. After listening to Smith's testimony, the trial judge imposed several limitations designed to protect petitioners from undue prejudice.[8] Prior to Smith's redirect examination, the court instructed the jury as to the bearing of the evidence it was about to hear (R. 1036–1039). The court charged in part:

> Now, there is some testimony, as I indicated to you, that does not name these defendants as participants in the crime. We call that impeaching testimony. * * * I charge you that you may accept that testimony that does not name

[8] The court ruled that it would not allow Smith to mention that Franzese was an underboss in organized crime or that Smith heard that Franzese was involved in any killings. The words "organized crime" were not to be used, nor any familiar underworld names (R. 930–932). See, also, as to Cordero, Pet. App. A, p. A15, fn. 9.

> these defendants as the believable testimony, and reject the testimony he gave before you. But it is of the utmost importance to understand that the issue upon which the Government is offering testimony is why this witness said he did not name these defendants on the prior occasions. This is collateral matter. We are not interested in whether what he says he knew or what he says he heard as the basis for the reasons for not disclosing the names is true or not. The real issue is did this witness believe what he heard and what he understood generally and was it for that reason that he failed to name these defendants at the previous times * * *

Thereafter Smith testified that, when he gave statements to the F.B.I. in October 1965 and evidence at the Polisi trial in January 1966, he feared for his life if he were to implicate petitioners. Smith's testimony (as well as that of the other members of the bank robber quartet who were permitted, under similar procedures, to explain the reasons for their prior failure to inculpate petitioners) is set forth in detail in the opinion of the court below, at Pet. App. A, pp. A10–A12.

During Smith's recross examination, petitioners' counsel for the first time brought up the issue of the inconsistency between his fear testimony at trial and his grand jury testimony of March 1966 where he gave a reason other than fear as the basis for his prior failure to implicate petitioners (see *supra.*, p. 7). On re-direct examination, the prosecutor asked Smith whether he recalled a conversation with him "relative to fear" just before Smith gave his

grand jury testimony (R. 1406–1707). Petitioners objected and the jury was excused. Asked to submit an offer of proof, the prosecutor stated (R. 1407–1408):

> What this is, your Honor, prior to these individuals—I make it a practice not only testifying before the grand jury but testifying in Federal Court, this statement that fear is a very critical thing, and I had a conversation with each of these individuals before they went into that grand jury and said "Don't mention this organized crime in there; don't mention this killing business; don't mention the fear element and the same when these people have been put on the stand. That is the reason for this.

After further colloquy, the court ruled that Smith could answer the question. The jury was recalled and Smith testified that he did not remember any such conversation (R. 1417–1418).

Petitioners do not challenge the general principle that a witness may always seek to explain away a previous inconsistent statement by testifying that it was impelled by fear. 3 Wigmore, *Evidence* (3d ed., 1940), § 1044; *Carbo* v. *United States*, 314 F. 2d 718, 743–744 (C.A. 9), certiorari denied, 377 U.S. 953; *United States* v. *Scandifia*, 390 F. 2d 244, 250–251 (C.A. 2), certiorari pending, No. 1290, this Term. They argue, however, that the principle should be limited to situations where "some objective verification for * * * the claimed mental state" (Pet. 23) is shown and contend that they were prejudiced in this case because the trial judge permitted Smith and the other witnesses to testify as to their fear, although there was no proof

that any of the alleged incidents giving rise to the fear had occurred. Apparently, petitioners' argument goes beyond a mere requirement that there be admissible evidence as to any underlying incident, for Smith had already testified as to Matera's threat at the organizational meeting. In any event, the contention is inconsistent with the purpose of the rule allowing the testimony as to fear. As the trial judge charged, the pertinent consideration is whether the witness was afraid when he gave the previous, inconsistent statement. A requirement that a witness could testify about his fear only if there were independent evidence of its basis in fact would serve no valid purpose and, indeed, could be very prejudicial to the defendant in the case of a defense witness. No case of which we are aware supports the proposition urged by petitioners. See, *e.g.*, *People* v. *Buchalter*, 289 N.Y. 181, 202, 45 N.E. 2d 225, 235–236 (Ct. App. N.Y.); *State* v. *Kwan*, 174 Wash. 528, 534, 25 P. 2d 104, 106–107 (Sup. Ct. Wash.). Of course, to the extent that a witness' explanation of the grounds for his fear seems fanciful, the jury is less likely to credit the genuineness of the fear. But that is a matter of credibility which a jury is competent to determine.

Petitioners also contend (Pet. 19–20) that the prosecutor deliberately misled them into undertaking a cross-examination of Smith based upon his prior inconsistent statements by telling Smith not to disclose before the grand jury that fear was the reason for his prior silence respecting petitioners. They claim that, had they been aware of a foreseeable risk of rehabilitation of Smith in the manner which occurred,

they would have confined themselves to impugning his motives in testifying for the government (Pet. 21). The court of appeals found (Pet. App. A, p. A13) that this claim was not credible given the strength of the government's case and the fact that petitioners utilized the same "tactic on Cordero and Parks, who had made no statement like Smith's before the grand jury, after experience with Smith revealed the riposte this would almost certainly attract."

In any event, there was no misconduct by the prosecutor in this case. When the prosecutor told the government's witnesses prior to their grand jury testimony that they should not mention "organized crime," "this killing business," or the "fear element" (see *supra*, p. 10), he obviously was trying to keep prejudicial testimony from coming before the grand jury.[9]

2. The indictment charged a conspiracy that operated between July 15, 1965, and September 30, 1965, "both dates being approximate." Petitioners contend that evidence as to events post-dating September 30, 1965, was improperly received and constituted a prejudicial variance from the indictment. The challenged evidence consisted of testimony as to a $50 payment from Potere to Smith, the meeting between Polisi and Zaher at which Polisi gave Zaher $200 and told him to "stay away," and communications between the lawyers for Parks and Cordero and Potere regarding money which Potere provided, primarily for bail and

[9] Petitioners conceded in the district court that the prosecutor's advice was not designedly wrong (R. 1409–1411)—a position they have since abandoned.

attorneys' fees. See *supra*, p. 6. This testimony related to events which occurred in October 1965, with the exception of certain correspondence between Parks' lawyer and Potere in November and December which the court instructed was admissible only as to Potere (see Pet. App. A, p. A20, fn. 13).

Petitioners argue on the basis of such cases as *Grunewald* v. *United States*, 353 U.S. 391; *Lutwak* v. *United States*, 344 U.S. 604; and *Krulewitch* v. *United States*, 336 U.S. 440, that the evidence showing payments of money for bail and attorney's fees, etc., postdating September 30, 1965, should not have been admitted because it did not relate to the bank robbery conspiracy charged in the indictment. The proof showed clearly, however, that the agreement to provide the robbers and their families with money in case of capture and incarceration was an integral part of the bank robbery scheme from its inception. The situation is thus significantly different from that in the cases cited above, where a theory of an implied conspiracy to conceal a completed crime was relied upon in an effort to extend the conspiracy concept to later acts.[10]

3. Petitioners invoke the supervisory power of this Court to correct alleged abuses of prosecutorial practices regarding arrangements and understandings with the four bank robber witnesses (Pet. 16–18, 28–30). The records shows, however, that no improper arrange-

[10] The trial court charged the jury not to consider against all petitioners acts or declarations of any one of them after the robbers' arrests, unless it found the conspiracy continued beyond those dates (R. 4142–4143).

ments or understandings with the witnesses were made. Petitioners refer to letters written by certain of the witnesses to the United States Attorney following their arrest (see R. 435–437, 440, 443–444, 452–453, 519–522, 2116–2117, 2984–2989) which demonstrate that some of the witnesses attempted to strike bargains with the prosecutor to have pending charges against them dismissed, or to receive assurances of non-prison sentences, in consideration for their testimony. In no case, however, was such a bargain concluded. Smith testified that the prosecutor advised him, in reply to one of his letters, that he could not comply with Smith's request (R. 452–453). The prosecutor represented, as to Parks, that he had never sought to get charges dropped (see R. 2984–2997). The extent of the government's agreement with any witness in this case was stated by the prosecutor in closing argument (R. 4035):

> Mr. Brown said these witnesses in the event that these five defendants are convicted have a better claim on the government, and I say to you the Government made an agreement with these witnesses if they testified and cooperated with the Government that their testimony would be made known or their cooperation would be made known to a sentencing judge, and that will happen, hell or highwater.[11]

[11] The prosecutor's remarks were occasioned by a previous statement by counsel for petitioners, which the court found to have no basis in the record, that "as they [the witnesses] reason it * * * it is far more important, more valuable to them that these people [petitioners] be convicted, that John Matera be convicted, than that he be acquitted, because if he is convicted they have greater claim for preference, for consideration when

There was no impropriety in that understanding. The jury could (and presumably did) determine for itself its effect, if any, on the credibility of the government's witnesses.

Petitioners also allege that the existence of an improper "bargain" (Pet. 29) between the government and the bank robber witnesses is revealed by the return to certain of the witnesses of properties seized from them after their apprehension. Petitioners point particularly to the return to Mrs. Cordero of a suitcase containing approximately $10,000 which had been seized at Cordero's house at the time of his arrest. Cordero initially told the F.B.I. that the money belonged to his wife (R. 1963). At arraignment, however, he stated that all of it was the proceeds of bank robberies (R. 1976). Mrs. Cordero, prior to trial, filed a motion for the return of the money, stating in an affidavit that the "monies are not the fruits of a robbery and belong to deponent who requires this cash immediately for support of her family" (R. 4581–4583). The prosecutor submitted an affidavit stating that, except for $200 in bills which were identified as coming from the Salt Lake City robbery, "the government has no evidence to show the remaining monies are not those of the aforesaid Eleanor Cordero, and has no other claims for this money from any other party" (R. 2072). After considering the affidavits, the trial judge ordered

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they come up to be sentenced for in one case seven bank robberies" (R. 3851–3852). In this context the court found the prosecutor's comments not prejudicial (see R. 4037–4042, 4049–4051).

the money, apart from the $200, returned (see R. 2070–2071). At trial Cordero testified that "close to $2,000" of the money in the suitcase came from bank robberies (R. 2102).

As the court of appeals noted (Pet. App. A, p. A19), the government "submitted the issue to the trial judge." The problem of identifying unmarked money as the fruits of a particular crime is always difficult. Considering Cordero's conflicting statements, both given before trial, the government's decision not to press the issue, while it may have been "complaisant" (Pet. App. A, p. A19), hardly shows that the government intended the return of the money to be a quid pro quo for Cordero's favorable testimony. The jury was well aware of the above facts, which were brought out on cross-examination of Cordero and alluded to in the court's charge (R. 4102–4104), and could determine for itself the effect on Cordero's credibility.

Petitioners' similar reliance on the return of automobiles to Smith and Parks is without foundation. There is no evidence in the record that either car had been used in the robberies or had been purchased with the proceeds of a particular crime. The government cannot oppose a particular demand for return of property on the ground that a defendant's income comes, in general, from illegal activities.

4. During the trial, petitioners were furnished with an F.B.I. report indicating that Cordero had stated that his wife had driven one of the three "switch" cars during the Oceanside robbery on August 13, 1965. On cross-examination, Cordero denied having said

this. He testified that his wife had participated innocently in the robbery and had been in the "switch car point" area (R. 1995–1998, 2007, 2329–2330).

After the government rested, petitioners announced that they intended to call F.B.I. agent Murphy to ascertain the name of an informer referred to by Murphy in an affidavit of September 25, 1965, to obtain arrest warrants for Smith, Cordero and his wife. Murphy had there recited that a "prior reliable informant" had advised that Mrs. Cordero was "a driver of the car used in the (Oceanside) bank robbery" and that she was the owner of a 1956 Oldsmobile which was used in one of the other bank robberies (R. 3344–3351). The government objected to disclosure of the informant's name. On a voir dire examination, Murphy testified that the informant had no part in the bank robberies, and that the information that Mrs. Cordero owned a 1956 Oldsmobile used in one of the robberies was incorrect (R. 3358–3364).

Petitioners argued that disclosure of the informant's name was necessary to enable them to show that Mrs. Cordero had participated in the Oceanside robbery, and thereby to cast further doubt on Cordero's credibility by revealing a possible motive for his testimony (*i.e.*, to conceal his wife's involvement). The court ruled that the informant's testimony would be collateral and that, "in light of the record here, the danger to any informant" it had "no hesitancy in saying that the balance weighs heavily in favor of keeping the name of the informant secret" (R. 3393). This ruling was justified. This is not a case like *Roviaro* v. *United States*, 353 U.S. 53, 64, where the

informant "had helped to set up the criminal occurrence and had played a prominent part in it." See, also, *McCray* v. *Illinois,* 386 U.S. 300, 309–311. The mere fact that an informant gave information leading to an arrest does not require disclosure. See *Rugendorf* v. *United States,* 376 U.S. 528. In this case, where the danger from disclosure was evident and the possible value of disclosure minimal, the trial judge acted well within his area of discretion in declining to require disclosure.[12]

For the reasons stated, we believe that none of the questions presented by petitioners warrants review by this Court. We have the duty, however, to inform the Court that conversations of petitioner Franzese on certain dates between January 10, 1962, and April 11, 1962, were overheard by federal agents by means of an electronic device installed by trespass in Franzese's home in Long Island, New York. The conversations, which long antedated the events and the conspiracy which formed the basis of the instant charge, concerned matters totally unrelated to the present case and involved no other defendant. We intend to make a disclosure to the district court in accordance

[12] These considerations are equally relevant to petitioner's related contention that the testimony of the informer might bear on the government's failure actively to contest the return of money to Mrs. Cordero, discussed *supra.* Moreover, as the court of appeals pointed out (App. A, p. A16, fn. 10), "the information related to the Oceanside robbery whereas the suspicion as to the money was primarily as to the later Salt Lake City robbery."

with the procedure which this Court prescribes in *Kolod* v. *United States,* No. 133, this Term, pending on the government's motion to modify. In view of the utter irrelevancy of the overheard conversations, we suggest that, in order not to delay the final disposition of this case, it would be appropriate for this Court to rule on the certiorari petition on the basis of the questions raised rather than to grant the petition on the basis of the overhearing. See brief for the government in *Scandifia* v. *United States,* No. 1290, this Term, currently pending. A ruling denying certiorari would be without prejudice to further proceedings in light of this Court's decision in *Kolod* v. *United States.*[13]

[13] There is no reason to consider the question raised by petitioners (Pet. 30–32), whether the government is required to disclose instances of illegal overhearing prior to the certiorari stage, although a defendant makes no showing or allegation that any unlawful electronic surveillance has taken place. It has long been the policy of the Department of Justice to make prompt disclosure, in any appropriate court, of any disclosable material obtained by means of unlawful electronic surveillance which comes to the attention of the Department through its review procedure. See Supplemental Memorandum for the United States in *Schipani* v. *United States*, No. 504, O.T., 1966, p. 5. The instant matter was not previously disclosed because, prior to the decision of this Court in *Kolod* v. *United States*, 390 U.S. 136 (decided January 29, 1968), the government did not believe it was required to disclose overhearings, such as those here, deemed not arguably relevant to the criminal case.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 106

DAVE EVANS, PETITIONER

v.

UNITED STATES OF AMERICA

No. 129

JOSEPH AMABILE, PETITIONER

v.

UNITED STATES OF AMERICA

No. 168

SALVATORE BATTAGLIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

Tre opinions of the court of appeals (Amabile Pet. Apps. A, B) are not yet reported.

JURISDICTION

The judgments of the court of appeals were entered on January 9, 1968 (Nos. 106 and 168) and on April 26, 1968 (No. 129). Petitions for rehearing *en banc* in Nos. 106 and 168 were denied on April 17, 1968. The petition for a writ of certiorari in No. 106 was filed on May 16, 1968, and in No. 129 on May 25, 1967. In No. 168 Mr. Justice Marshall extended the time to file to June 10, 1968, and the petition was filed on June 7, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

All petitioners present the following questions:

1. Whether the evidence was sufficient to show a conspiracy to violate the provisions of the Hobbs Act, 18 U.S.C. 1951.

2. Whether the trial court erred in denying a request for the production of grand jury minutes.

Evans and Amabile (Nos. 106 and 129) present the following question:

3. Whether, in the circumstances of this case, the trial court properly restricted cross-examination of a government witness about a pending state indictment against him and about a federal tax investigation into his affairs.

Evans and Battaglia (Nos. 106 and 168) present the following question:

4. Whether, in the circumstances, the trial court erred in not permitting an inquiry as to the present address of the witness who had been the victim of the extortion.

Amabile and Battaglia (Nos. 129 and 168) present the following question:

5. Whether Congress intended the Hobbs Act to cover the circumstances shown in the present case.

Evans (No. 106) presents the additional question:

6. Whether the trial court erred in rejecting his attempt to show a good reputation in the business community.

Amabile (No. 129) raises the following question:

7. Whether the trial court erred in terminating a line of inquiry about Jencks Act material.

Battaglia (No. 168) raises the following question:

8. Whether the court below erred in determining for itself that a conversation overheard in the course of an electronic surveillance that took place long before the events in question was irrelevant to this case.

STATUTE INVOLVED

18 U.S.C. 1951 provides in relevant part:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to

do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section—

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

STATEMENT

After a jury trial in the United States District Court for the Northern District of Illinois, petition-

ers were convicted of conspiring to obstruct interstate commerce by means of extortion in violation of 18 U.S.C. 1951. Amabile and Battaglia were sentenced to imprisonment for fifteen years, and were fined $10,000. Evans was sentenced to imprisonment for ten years. The court of appeals, in separate opinions, affirmed the convictions, one judge dissenting (Pet. App. A, B).[1]

The relevant evidence showed that Evans was employed as a construction superintendent for the Riley Management Corporation, which developed real estate in Northern Illinois. The president and owner of 90% of the shares of the corporation was William Riley (A. 489-490, 497).[2] Riley's company purchased materials and supplies from "various parts of the country" (A. 492). In June of 1964, Riley and Evans discussed arrangements for securing subcontractors for the development of an apartment complex in Lansing, Illinois. Riley cautioned Evans that he wanted to keep the Lansing project a secret from "the boys in Melrose Park"—"especially * * * from Joe Shine [Petitioner Amabile] and Nick Palermo," since Riley feared that he would otherwise be "forced to use them again as subcontractors" (A. 502). Amabile had been connected with earlier Riley projects and had on several occasions threatened Riley and his family (A. 545-567). Evans said that he "knew of the

[1] Unless otherwise indicated, "Pet. App." refers to the appendices to the petition filed by Amabile, which sets out all of the opinions below.

[2] References are to the Joint Appendix on file with the Clerk of this Court.

problem." He agreed to keep the project a secret from Amabile and Palermo (A. 502-503).

In the early part of July 1964, Nick Palermo telephoned Riley and requested his presence at his Melrose Park establishment. Riley met with Palermo and Amabile (A. 503, 505) and was told that Palermo was to get the plumbing contract on the Lansing project. Riley protested that he did not plan on giving Palermo the work, but Amabile threatened that he would "stop" other Riley projects in Northlake and Westmont. Amabile added that "he knew how to handle wise guys and that [Riley] would be walking the streets with a candy cane;" that "they knew where [Riley's] mother lived;" that "he knew where [Riley's] kids went to school and they had a baseball bat to handle wise guys like [him]" (A. 506-507). In September or October 1964, Riley awarded the Lansing plumbing contract to Palermo because he feared economic ruin as well as physical harm to his family and employees (A. 507, 511). A few days after that July meeting with Amabile and Palermo, Riley told Evans about the meeting and said that he was "disgusted and frightened" because they had learned about the Lansing project (A. 512). He instructed Evans to obtain for the sewer work a contractor who was "foreign" to Amabile and Palermo (A. 515).

In the meantime, however, Amabile had already set the machinery in motion to obtain the sewer contract. He had told Mike DiVito, a sewer contractor, that he (Amabile) could not get the sewer work if DiVito's name were on the contract (A. 118-120). Amabile advised DiVito and unindicted co-conspirator Rocco

Pranno that if they could "come up with a good clean guy" to front for the sewer contract operation Amabile could get the contract (A. 124). Thereafter, Pranno hired Henry LaKey, an experienced construction foreman, for this purpose (A. 126-127). In the middle of September, Evans, who was described as Amabile's "man" (A. 129, 281, 284, 302, 309, 362) and had been placed by Amabile in the Riley organization (A. 309), met with Pranno, DiVito, and Amabile at the latter's apartment. Amabile indicated his approval of LaKey as a front man. He told Pranno and DiVito that before they received the sewer contract, he was to be assured of $20,000 in cash. After Evans showed Pranno and DiVito the plans and specifications for the project, they agreed to the $20,000 fee (A. 127-129). In the latter part of the same month, Evans, LaKey, and DiVito again met with Amabile at his apartment. After discussing certain project specifications, Amabile reminded DiVito that he (Amabile) was to get $20,000 "off the top" (A. 255-256). When Evans, LaKey, DiVito, and Amabile met for a third time on October 1, DiVito suggested that there was not enough money in the contract to give Amabile his $20,000 cut. At Amabile's suggestion, Evans then rewrote the proposed contract to include an additional $45,000 (A. 262-266). LaKey, DiVito, and Pranno then set up a new corporation (Carlson Construction & Equipment Company, hereinafter "Carlson") in which LaKey was installed as the titular president (A. 130-132, 270-277). Evans, after recommending the company to Riley as having an excellent reputation, then awarded Carlson the con-

tract (A. 132, 268, 516). Payments were to be made to Carlson by a suburban savings and loan company on the basis of payout slips issued by Riley's company (A. 269-270, 519, 903). Carlson began construction in October 1964 (A. 134, 521).

Before the first draw from the savings and loan association, Amabile told LaKey that he was going to give Evans $5000 for his role, instead of $7500 (A. 297). When Amabile and LaKey later met Evans, Amabile gave him a "wad of bills" (A. 300).

On November 12, LaKey received the first draw, in the amount of $47,000. He deposited $39,000 in the Carlson payroll account, and gave another $8000 to Pranno (A. 303-305). Shortly thereafter, at Amabile's directions, LaKey withdrew $20,000 from the Carlson payroll account and gave it to Amabile (A. 306).

In late November or early December, LaKey went with Amabile to a horse farm in Pingree Grove where Amabile introduced LaKey to petitioner Battaglia as "Hank LaKey running the job for them in Lansing, Illinois" (A. 331). LaKey overheard Battaglia saying to Amabile that they had planned on giving Evans too much of a cut (A. 332-333). After leaving Battaglia, Amabile warned LaKey not to mention the visit (A. 333-334, 338-339). When LaKey mentioned to Evans that he had visited Battaglia's farm, Evans warned him not to let Amabile hear him talking about the meeting (A. 339-340).

Prior to the second draw, LaKey learned that Riley had allocated only $120,000 for the sewer contract, instead of the $200,000 LaKey had anticipated. He

told Evans that he was concerned about the other $80,000, since he was obligated on all of Carlson's contracts for materials. In response, Evans stated, "I told you don't get worried about it. I will talk to Joe Shine [Amabile] and Joe Shine will talk to the man * * * We will see that the money is in the bank for you" (A. 342).

In January 1965, LaKey and Evans prepared the necessary papers for the second draw of $48,000 (A. 344). Riley's comptroller, however, refused to authorize the issuance of a pay-out slip because Carlson had failed to pay materialmen (A. 345-346). LaKey immediately reported the refusal to Amabile, and Amabile quickly directed Evans and LaKey to see Riley the following morning to obtain the necessary authorization for the second draw (A. 346-347). On that visit, Riley told LaKey, in Evans' presence,[3] that he would not authorize the second draw until Carlson paid its bills (A. 349-351, 527-528, 531). LaKey then reported to Amabile that Riley still refused the second authorization. Amabile told LaKey to return the following morning at which time he would "* * * get this thing straightened out for once and for all" (A. 351).

The next day, LaKey and Amabile visited Riley at his office. Riley narrated what happened at that meeting:

> Mr. Shine [Amabile] told me that I had to pay this man, that this man was a friend of theirs;

[3] In order to keep Riley from knowing that they were working together, they entered separately and eventually convened in Riley's office (A. 347).

that I was expected to pay them; that if I didn't pay them all sorts of people would get mad.

I told Joe that it would be foolish for me to make this payment; that they were just pushing this company to ruination; that it just was absolutely ridiculous to pay this man and that I did not want to pay him. [A. 533-534.]

* * * *

Mr. Shine told me that I had no choice on this matter; that I had to pay this man; that "the man" wanted him paid.

* * * *

He told me "the man" said I had to pay him and he told me if I didn't pay him there would be all sorts of trouble, and there was no sense in me making this trouble for myself so I better pay him because he was a friend of theirs. [A. 535.]

Riley subsequently authorized the payment of $48,000 because he was "afraid" (A. 535-536). This was the sum mentioned in the indictment. As a result of this payoff, assets of Riley's company were depleted and he had to terminate construction at the Lansing project (A. 500). Moreover, steel which was ordered from the LeClede Steel Company in St. Louis, Missouri, was never paid for (A. 566-567).

In February or early March 1965, Pranno and DiVito drove to Battaglia's farm to have "the man" settle an internal dispute with Amabile, who met them there. In the course of describing the grievance, which involved a loan that he and DiVito had made to the company that LaKey was fronting, Pranno reminded Battaglia that $20,000 from the Lansing project was intended for him. When Pranno men-

tioned a second time that the $20,000 was to go to Battaglia, Battaglia again indicated his awareness of his financial interest in the venture (A. 171-172).

ARGUMENT

1. All petitioners contend that there was insufficient evidence showing a conspiracy to extort money from Riley. There can of course be no doubt, on this record—and petitioners do not suggest to the contrary—that they knowingly and voluntarily combined with the other conspirators in a criminal course of conduct designed to mulct funds from the Lansing project. We submit that there can be no more doubt that they joined in that effort with full knowledge that Amabile would, if necessary, revert to what the dissenting judge below aptly termed "his more accustomed role, that of an extortionist" (Pet. App. B 57), in order to achieve the object of that conspiracy. The basic flaw in petitioners' argument, as we shall see, is that it unrealistically assumes that the object of the conspiracy was mere "fraud", as such. On the contrary, however, the object of the consort was to expropriate handsome shares of the investments in the Lansing project; the use of fraudulently contrived and inflated contracts was a technique for achieving this objective. But the jury was fully warranted in concluding that petitioners contemplated more forceful measures if, as happened, the "mere" fraud ran into a snag.

Amabile and Battaglia seem to agree that joint venturers embarked on a criminal conspiracy take their chances as to those methods used by their associates *if*

those methods fall within the common purposes of the venture as they understand it, see *United States* v. *Peoni*, 100 F. 2d 401, 403 (C.A. 2); *United States* v. *Crimmins*, 123 F. 2d 271, 273 (C.A. 2); *United States* v. *Andolschek*, 142 F. 2d 503, 507 (C.A. 2).[4] But Battaglia argues that there was no evidence showing that it was his understanding that the conspiracy would embrace extortion, if needed. Amabile does not argue lack of evidence with respect to his own implication in the extortionate acts; he contends, however, that neither Evans, Battaglia, nor Pranno were aware that *he* would resort to extortion to achieve the objects of the criminal conspiracy and thus that there was no conspiracy to violate the Hobbs Act (Pet. 38-41). The evidence, however, is to the contrary.

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[4] In accordance with the general principles set forth in the cited cases, the trial court charged (A. 968-969):

> When a person embarks upon a criminal venture of indefinite outline with other persons, he may be held responsible for actions taken by his co-conspirators which tend to further the common objectives as he understood them. The government need not show knowledge of all those acts or of any particular phase of the scheme. It is necessary, however, that the government prove from all the evidence and beyond a reasonable doubt that each defendant was aware of the common purposes, that each accepted the purposes, made them his own, and that each phase of the conspiracy charged in this indictment was within the scope of those criminal purposes.
>
> A common purpose may be inferred by you, ladies and gentlemen of the jury, if you find from the evidence and beyond a reasonable doubt that the persons concerned pursued the same object and adopted means leading to the same unlawful results, even though individual defendants or co-conspirators may have done acts in furtherance of the common design apart from and unknown to the others.

Thus, the record demonstrates that Amabile had "placed" Evans in the Riley organization in February or March 1962 (A. 309, 498)—before Riley had begun construction on his Northlake project. When Riley began the Lansing project and mentioned to Evans that he had been "forced" into using Palermo on the Westmost project, Evans said that he "knew of the problem" (A. 502). During the latter part of 1964, Riley told Evans that he was "disgusted and frightened" because Amabile had learned about the Lansing project (A. 507), and that he was again being "forced" to use Palermo (A. 522-523). Finally, it was Evans who told LaKey that he would talk to Amabile and that Amabile would "talk" to Riley about the shortage in the drawing account. Thus it was Evans who, despite his awareness of his employer's fear of Amabile, actually sponsored the confrontation between Amabile and Riley. In these circumstances, there was clearly sufficient evidence from which the jury could conclude that Evans, fully aware of Amabile's methods of enforcement, had joined and remained in the conspiracy with full knowledge that Amabile would resort to those methods, if necessary, in order to achieve the objective of the group.

With respect to Battaglia, the evidence was equally sufficient. Although his role was, for the most part, the covert function of the "silent partner," the evidence showed that Amabile was Battaglia's subordinate in the criminal hierarchy, and that Amabile acted at his direction. Battaglia was aware of the illicit scheme to siphon funds from the Lansing project, and knew he was to receive a substantial share of the

proceeds.[5] In these circumstances, the jury could conclude beyond a reasonable doubt at least that Battaglia understood the scheme to include resort to threats if necessary, even if his authority over Amabile, coupled with the phrasing of Amabile's threats to Riley, do not warrant a further—but unnecessary—inference that Amabile actually conveyed the warning at Battaglia's direction.[6]

In light of the sufficiency of the evidence showing that Evans and Battaglia contemplated that their conspiracy might embrace resort to force, Amabile's argument that he cannot be convicted of *conspiracy* to extort necessarily falls.

2. After the government witness DiVito had testified on direct examination, counsel for Amabile moved for the production of his grand jury testimony. The government consented to a procedure whereby the testimony would be turned over to the court for an *in camera* inspection, but the defendants indicated no interest in this procedure (A. 195). The motion for production was later denied (A. 233). Motions for the production of LaKey's and Riley's grand jury testimony were similarly denied (A. 389-390, 689).

The court below held, on the appeal by Evans and Battaglia, that "no particularized need for this testimony was shown, nor was there any showing that the

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[5] Battaglia suggests (Pet. 9, note 9) that his statements at the arbitration conference at his farm were inadmissible because made after the extortion from Riley. This ignores the fact that they were his own statements and were chargeable to him.

[6] See Batt. Pet. 8, note 8.

ends of justice required production" (Pet. App. B 41). In the subsequent appeal by Amabile, the court of appeals, with the government's acquiescence, ruled that as of the date of its opinion, defense counsel would henceforth be entitled to access to the relevant grand jury testimony of witnesses who testified at trial unless the government showed why access should be denied.[7] It nevertheless reaffirmed its earlier holding that no "particularized need" had been shown (Pet. App. A 10-12); see also *United States* v. *Youngblood*, 379 F. 2d 365 (C.A. 2).[8]

The decision of this Court in *Dennis* v. *United States*, 384 U.S. 855, did not disturb the earlier holding in *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395, 400, that, before a defendant is entitled to the grand jury testimony of a witness who has testified at trial, he has the burden of showing a "particularized need" for inspection. As noted by this Court in *Dennis*, the trial judge retains the function of "deciding whether a case has been made for production." *Id.* at 875. And in *Dennis*, the Court listed five separate circumstances that showed why the de-

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[7] In accordance with this policy, as noted by Battaglia (Batt. Pet. 22, Note 20), the grand jury testimony of Riley was disclosed in *United States* v. *Amabile*, No. 67 Cr. 86, another Criminal Case against Amabile. That testimony is appended to Battaglia's petition at 68a-100a.

[8] That the court of appeals applied general principles of *stare decisis* to Amabile's case, while indicating that a more liberal discovery procedure should prevail in the future, does not violate principles of due process of law. *E.g.*, *Durham* v. *United States*, 214 F. 2d 862 (C.A.D.C.), certiorari denied, 364 U.S. 854.

fendants in that case had such an interest in access to the grand jury minutes. *Id.* at 872-873. Here, however, counsel for Amabile moved for a wholesale production of the grand jury testimony as a matter of right, and offered the court no explanation of why there was special need for the grand jury testimony of the several government witnesses. When the original request was made, counsel contended that he was entitled to grand jury testimony as a matter of right under the Jencks Act, 18 U.S.C. 3500 (A. 195). It is obvious, we submit, that defense counsel were merely engaging in a "fishing expedition".[9]

In fact, most of Riley's grand jury testimony related to matters that were not relevant to the present case, but bear on the other, later prosecution of Amabile (No. 67 Cr. 86). Despite this governmental interest in not permitting premature, random disclosure, defense counsel ignored an offer for an *in camera* examination in which the then irrelevant material could have been excised. Thus, petitioners' failure to obtain the relevant Riley grand jury testimony was, in large part, of their own making.

Moreover, with respect to DiVito and LaKey, the error, if any, of the prosecutor in failing to respond to petitioners' wholesale request for production of their grand jury testimony was, in the circumstances, harmless. We are lodging with the Clerk of this Court the grand jury testimony of DiVito and LaKey,

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[9] Although counsel for Evans repeatedly joined in other motions which he believed to be in his client's interest, he did not join in the motions for production at trial, and did not assign the court's ruling as error in the court below.

together with the Jencks Act material relating to these witnesses which was actually turned over to the defense. As the grand jury transcript clearly shows, the only testimony which they gave before that body was a reading of signed statements made to agents of the Internal Revenue Service. These statements, however, had been turned over to the defense in the original form, under the provisions of 18 U.S.C. 3500. In these circumstances, the only information which the defense could have obtained from the grand jury minutes was already in their possession. The "failure to require production * * * was [thus] empty of consequence," *Rosenberg* v. *United States*, 360 U.S. 367, 370-371, and there is accordingly no occasion for further review.

3. Amabile and Evans contend that the trial court committed reversible error in restricting Amabile's attempt to show that Riley was under a state indictment for theft and under tax investigation by the Internal Revenue Service at the time of trial. In the circumstances, however, the ruling of the trial court was proper. As noted by this Court in *District of Columbia* v. *Clawans*, 300 U.S. 617, 632:

> The extent of cross-examination rests in the sound discretion of the trial judge. Reasonable restriction of undue cross-examination, and the more rigorous exclusion of questions irrelevant to the substantial issues of the case, *and of slight bearing on the bias and credibility of the witnesses*, are not reversible errors. [Emphasis added.]

Here, as he perceived it in context, the trial judge was confronted with two conflicting principles—that which states that "bias"—*e.g.*, an expectation of leniency for cooperation with the government—may always be shown, and that which forbids general impeachment of character by way of showing that the witness is under indictment or investigation. After receiving an offer of proof as to what these questions were designed to elicit, the trial court properly held that the danger of impeachment by an improper means outweighed the probability of showing bias on the part of the witness. That a person's tax matters are under investigation is not probative of bias towards the government. And, in any event, the United States Attorney is not empowered to chart the course of a state prosecution or federal tax investigation.

Moreover, notwithstanding the trial court's ruling, petitioners managed to bring these facts to the attention of the jury through a series of questions, proper and improper, designed, as the court below observed (Pet. App. A 8), to "smear" the witness by innuendo. Thus, besides asking the very questions which the court disallowed, defense counsel established that Riley did have tax problems (A. 644, 662, 663); had met with federal agents in the office of two lawyers who were prominent in the defense of criminal tax cases (A. 658); and had "a problem in the State Court" (A. 663). In addition, the defense implied by innuendo that Riley had been a drunkard (A. 621, 622, 623); that he had been sued for fraud (A. 641); that he had "bounced" several checks (A. 669, 671);

and that a complaint had been filed with the State's Attorney for a bad check charge (A. 690).[10]

4. On cross-examination, counsel for Battaglia asked Riley his present address. Government counsel objected to the question and requested a hearing outside the presence of the jury. The court sustained the objection without a hearing (A. 723).

Battaglia and Evans[11] now contend that this Court's decision in *Smith* v. *Illinois*, 390 U.S. (see, also, *Garafolo* v. *United States*, 390 U.S. 144), requires a *per curiam* reversal in this case. In *Smith*, however, this Court reaffirmed what was said in *Alford* v. *United States*, 282 U.S. 687, 694, that "[t]he extent of cross-examination with respect to an appropriate subject of inquiry is within the sound discretion of the trial court" and that "[t]here is a duty to protect [the witness] from questions which go beyond the bounds of proper cross-examination merely to harass, annoy or humiliate him." To that category Mr. Justice White, in a concurring opinion, added "those inquiries which tend to endanger the personal safety of the witness." *Smith*, *supra*, at 133-134. Here the danger to Riley's personal safety was obvious to the trial judge. This case directly involved threats of violence against Riley and his family by an underworld conspiracy. Moreover, the trial judge had been advised that Riley was under the protective cus-

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[10] The state indictment was for forgery (see Amabile Pet. 25). Seven questions of the type discussed are quoted by the court below (Pet. App. A 7, note 3).

[11] The issue was not raised by Evans at trial or in the court below. It was first mentioned in a petition for rehearing filed by Battaglia.

tody of the United States Attorney (A. 41), and that the government witnesses were escorted to the courtroom under strict security measures (See A. 179-180). The trial court was also well aware of the "enforcement" methods practiced by Amabile. In these circumstances—where the danger of intimidation and reprisal was apparent at the time the question was asked—the trial judge did not abuse his discretion in terminating the line of inquiry. *Capriola* v. *United States*, 61 F. 2d 5, 10 (C.A. 7), certiorari denied, 287 U.S. 671.[12]

5. *a.* There is no substance to Battaglia's argument that Congress did not intend the Hobbs Act to apply to the circumstances shown here. His discussion of this contention (Pet. 10-18) indicates that the issue is merely the challenge to the sufficiency of the evidence, under a different label. We have already shown that the evidence was adequate to establish all statutory elements. Given these facts, the statute clearly applies. As noted by this Court in *Stirone* v. *United States*, 361 U.S. 212, 215:

> That Act speaks in broad language, manifesting a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery or physical violence. The Act outlaws such interference "in any way or degree."

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[12] In *Smith*, of course the witness refused to give his true name or address, and thus in the absence of awareness of his very identity, the court found that a "rudimentary inquiry" had been "emasculate[d]." 390 U.S. at 131. The question of Riley's current address hardly had such significance in the present case.

Congress spoke in broad language because "elimination of terroristic activities * * * was the aim of the statute * * *." *United States* v. *Local 807*, 315 U.S. 521, 530. Thus, the activities engaged in by these petitioners—manifesting itself in terms of professional gangsterism and terrorism—are clearly within the coverage of the Hobbs Act.

b. Nor is there any more merit in Amabile's related suggestion (Pet. 33-38) that the extortionate acts committed in furtherance of the conspiracy did not in any degree obstruct, delay or affect interstate commerce. The evidence—which the jury credited—showed that Riley's Lansing construction project depended upon the shipment of supplies and materials in commerce, that he feared that the payments extracted would cause the "ruination" of his company, and that the extortion practiced upon Riley actually caused a depletion of assets of his company which, in turn, necessitated termination of that project. In these circumstances, the trial court properly charged that such evidence, if believed, would authorize an inference that interstate commerce was affected.[13] See *Nick* v. *United States*, 122 F. 2d 660 (C.A. 8), certiorari de-

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[13] The court charged (A. 972-973):

> If you believe beyond a reasonable doubt that the resources of Riley Management Corporation were depleted by extortion, and you must find the government has proved extortion beyond a reasonable doubt, and if you further believe that the business of Riley Management Corporation conducted at the job site in question depended on shipments of materials and supplies in commerce, you may infer that the extortion in some way or degree did obstruct, delay or affect interstate commerce.

nied, 314 U.S. 687; *Hulahan* v. *United States*, 214 F. 2d 441 (C.A. 8), certiorari denied, 348 U.S. 856; *United States* v. *Lowe*, 234 F. 2d 919 (C.A. 3), certiorari denied, 352 U.S. 838; *United States* v. *Green*, 246 F. 2d 155 (C.A. 7), certiorari denied, 355 U.S. 871. This is especially true where, as here, the evidence undeniably showed that Riley was unable to pay out-of-state suppliers of materials ordered for the project as a result of the depletion in assets (A. 566-567).

6. In an attempt to establish his general reputation for honesty, integrity, and veracity, Evans called four defense witnesses, all of whom had been associated with him on various Riley projects (A. 811-813, 816-818, 820-825, 839-840). After establishing that each had worked with Evans, and that employees on the various Riley projects had discussed their dealings with Evans, counsel asked each witness if he could testify to Evans' reputation. On each attempt, the court sustained the government's objection to the question put (A. 813-816, 818-819, 825-828, 843, 847).

In the circumstances, the court below properly held that a proper foundation had not been established to show the general reputation of Evans. This Court stated in *Michelson* v. *United States*, 335 U.S. 469, 482, that "[r]eputation is the net balance of so many debits and credits * * *," and that, in order to establish a general reputation, "the witness must qualify to give an opinion by showing such acquaintance with the defendant, the community in which he has lived and the circles in which he has moved, as to speak with authority of the terms in which generally he is

regarded." *Id.* at 478. Here it is clear that the witnesses were not acquainted with Evans' community, but only with persons who had associated with Evans for a limited period in a limited relationship on the Riley projects. These persons, it is clear, cannot be considered acquainted with the "net balance of so many debits and credits" which would determine Evans' general reputation, and were thus not capable of assessing that reputation at all. See *Williams* v. *United States*, 168 U.S. 382, cited with approval in *Michelson, supra*, at 481, note 17. This conclusion is confirmed by the uncontested fact that Evans had been placed in Riley's employ by Amabile and was clandestinely conspiring to defraud the very employer for whom the various "character" witnesses worked when they were observing Evans. In this context, the lack of traditional foundation for the accuracy of their impression of Evans' character is underscored by the likelihood that his business reputation was in fact a charade.

7. As noted in the Statement, Amabile had been connected with earlier Riley projects. On one specific occasion in September of 1963, Amabile and Palermo visited Riley with intent to obtain the plumbing contract for his Westmont project (A. 560-565). According to Riley's testimony, when he indicated that he would not give the contract to Palermo, Amabile—

> * * * told me I was nothing but a wise guy. I should quit being a wise guy and that he would handle me with a baseball bat if I didn't stop trying to be a wise guy. [A. 564.]

Amabile added at that same time—

> "You little Irish s.o.b., we know—" He told me he knew where my mother lived. He told me he knew where my kids went to school. He told me that I would need a candy cane from then on out if they did not get the work * * * [and] * * * if I did not use them nobody is going recognize me. [A. 565.]

Under the provisions of 18 U.S.C. 3500, defense counsel obtained possession of three F.B.I. statements and two Internal Revenue Service statements made by Riley. On cross-examination, counsel for Amabile asked Riley if he had related the specific conversation —that is, the exact threatening words used by Amabile—to F.B.I. Agents Dallman and Kotsos during the interview of October 5, 1965, and whether the specific words were transcribed in the F.B.I. memorandum covering that interview. As Riley was reading the F.B.I. memorandum on the witness stand,[14] the court, at the government's request, directed the witness not to answer the question (A. 683-684). After an objection was sustained to a similar question relating to another F.B.I. interview, counsel made an offer of proof to the effect that he intended to bring out the fact that the specific wording of the threats was not transcribed in any of the Jencks Act material. The court rejected the offer of proof and sus-

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[14] Contrary to Amabile's suggestion (Pet. 45, footnote 3), Riley had never read the memoranda relating to the F.B.I. interviews before he took the witness stand (A. 687, 709). The statements which Riley testified he had read before the grand jury were signed statements given to the Internal Revenue Service.

tained objections to similar questions relating to another F.B.I. memorandum and two Internal Revenue Service memoranda (A. 658-688).

In the circumstances, the district court did not err in terminating the line of inquiry. The provisions of 18 U.S.C. 3500 relating to the production of statements to government agents do not modify or affect the ordinary rules of evidence regarding the admissibility of such statements which have been produced. *Palermo* v. *United States*, 360 U.S. 343; *Campbell* v. *United States*, 373 U.S. 487. Here, counsel for Amabile offered the lack of reference to specific threats in the Jencks Act material in an attempt to impeach Riley's earlier testimony to the effect that he had reported such threats to the government agents. That the reports did not reflect the exact wording of the threats would be relevant only if it was shown that the government agents had transcribed Riley's statements *in haec verba*. That foundation was not established. Prior to the offer of proof, counsel for Amabile did not establish whether or not the agents who had prepared the reports had transcribed Riley's statement in all of its details, including specific language of threats, or whether the agents merely summarized his statement. The record does show that the Interview Reports were prepared after Riley had had "three or four solid days" of conversation with the F.B.I. (A. 709). If the reports were merely a summary, then the absence of the specific wording in the report would be devoid of probative value on the question counsel sought to raise. As the court below noted, counsel chose not to call the government agents

in order to establish the necessary foundation, or to determine whether Riley reported the actual threats to them.

8. Prior to trial, Battaglia moved for a hearing to determine the existence and extent of electronic eavesdropping. The government opposed the motion, in accordance with the view at the time that there was no duty to disclose material not even arguably relevant to the case. The district court denied the motion. After this Court's decision in *Kolod* v. *United States*, 390 U.S. 136 (motion to amend the order of remand set down for reargument, *Alderisio* v. *United States*, No. 133, October Term, 1967), Battaglia filed a motion with the court of appeals to remand the cause to the district court for an "adversary hearing" comporting with the requirements of *Kolod*. In response to that motion, the government filed with the court of appeals three documents which reflected three brief conversations, two of which occurred in 1960 and one in 1961—three-to-four years before the events here involved. The court below, in denying the motion for remand, held (Battaglia Pet. 44a-45a):

> A careful *in camera* examination of the transmitted material reveals that these conversations were utterly irrelevant to these convictions. We are frequently called upon to determine relevancy as a matter of law. This case is still pending here on a petition for rehearing *en banc* and the documents are also before us. These factors, coupled with the utter irrelevancy of the documents make it appropriate to dispose of the matter here. Review here also avoids additional delays to defendants. In our view, *Kolod* does not require fur-

> ther District Court action in the circumstances of this case. If there were any doubt as to the tainting of these convictions by the use of these documents, we would afford relief to defendants. There being no such doubt, there is no need to vacate our judgment and remand for a District Court documentary review.

In the circumstances, the court of appeals did not err in denying the motion for remand to determine the relevancy of monitored material which it had already found to have been "utterly irrelevant" as a matter of law. The opinion of the court below clearly pointed out that if there had been any doubt as to relevancy, a remand would have been ordered. Inasmuch as each of the defendants challenged the sufficiency of the evidence, the court below was, as its lengthy opinion demonstrates, quite familiar with the factual issues of the case, and was thus in an adequate position to determine the relevancy *vel non* of the monitored conversations.[15]

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[15] Judge Swygert dissented and thought that the case should have been remanded to the district court. He did not dissent, however, from the majority's finding that the material was "utterly irrelevant," but instead concluded that even if this Court modifies the remand in *Kolod* in accordance with the government's motion, disposition of the question should properly be made by a district judge. Our position in *Kolod* would not require that the district court make an initial determination as to relevancy when the case is actually pending before a court of appeals on full-scale evidentiary review.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petitions for writs of certiorari should be denied.

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JULY 1968.

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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 124

JOSEPH AIUPPA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on April 25, 1968. The petition for a writ of certiorari was filed on May 24, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the testimony of the government's chief witness should have been excluded as the product of an unlawful search and seizure.
2. Whether the evidence supports the verdict.
3. Whether the trial judge erred in refusing to in-

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terrogate the jury with respect to its exposure to prejudicial articles appearing in newspapers during the two-day trial.

4. Whether the trial court erred in allowing the jury to separate for lunch during the course of its deliberations.

5. Whether the court's instruction to the jury that a defendant cannot be compelled to testify and that the jury may not in any manner draw an inference against the defendant because of his failure to testify was improper.

STATEMENT

After a jury trial in the United States District Court for the District of Kansas, petitioner was convicted on two counts of an indictment charging the unlawful possession and transportation of migratory birds in violation of 16 U.S.C. 703. On August 19, 1966, he was sentenced to imprisonment for three months and to a fine of $500 on each count.

Petitioner had been convicted on both counts of the indictment in 1963 but that conviction was reversed on the ground that evidence as to the seizure of 560 frozen mourning doves from petitioner's car should have been suppressed as the product of an unlawful search. *Aiuppa* v. *United States;* 338 F. 2d 146 (C.A. 10). The circumstances there shown were as follows. On September 24, 1962, a United States Game Management agent received information from an informer that petitioner and others had been hunting in the Frontenac-Pittsburg, Kansas area and had killed an enormous number of doves; and that one Andrew Williams was cleaning, packaging, and storing the

doves (App. 26). On October 1, 1962, that agent informed another agent at Springfield, Illinois, that petitioner and his wife had left Frontenac, Kansas, for Chicago in a Cadillac and were transporting between four and five hundred mourning doves (App. 11). The agent proceeded to petitioner's home in Elmhurst, Illinois, and searched his car in the driveway, thereby discovering the 560 doves (App. 14–16). The court of appeals ruled that federal game management agents do not have authority under 16 U.S.C. 706 to conduct a search without a warrant even though they have probable cause to believe that illegal game is in an automobile.

The federal game management agent in Kansas did not contact Andrew Williams until after October 1, 1962 (App. 27). At petitioner's second trial, the government's principal witness was Andrew Williams (App. 151–169), who was permitted to testify, over the objection of petitioner that Williams' testimony was the result of a lead emanating from the illegal search (App. 151–152). Williams testified that he cleaned a large number of mourning doves during the month of September 1962 (App. 152). He placed 10 doves each in plastic bags and stored the bags in ice boxes at a Dairy Queen store (App. 156, 161). Williams testified that he placed one of these "cartons" in petitioner's Cadillac and that three other "cartons" or "ice boxes" were placed in the car (App. 159–161). He assumed that there were approximately four or five hundred birds in the back of petitioner's car (App. 165).

Williams also testified that petitioner asked him for the best way to drive to Missouri without any traffic and he gave petitioner the directions which he requested (App. 163).

ARGUMENT

1. Petitioner contends that the testimony of Andrew Williams at the second trial should have been suppressed because it was obtained as a result of a lead emanating from the illegal search. The government had, however, learned from an informer, more than two weeks before the illegal search, that Williams was cleaning and packaging doves for petitioner. Since the government knew of Williams' existence prior to the illegal search it is immaterial that the government did not interview him until after the search. The government's knowledge was based on an independent source and was not the product of the subsequent illegal search. See *Wong Sun* v. *United States,* 371 U.S. 471; *United States* v. *Paroutian,* 319 F. 2d 661 (C.A. 2), certiorari denied, 375 U.S. 981.

Moreover, the proffer of a living witness cannot be mechanically equated with the proffer of inanimate evidentiary objects derived from an illegal search. In these circumstances, courts have focused on the attributes of will, perception, memory and volition involved in a live witness' testimony and have refused to reject such testimony solely because a lead may have been obtained as the result of a prior illegality. *Smith* v. *United States,* 324 F. 2d 879 (C.A.D.C.), certiorari denied, 377 U.S. 954; *Brown* v. *United States,* 375 F. 2d 310 (C.A.D.C.), certiorari denied,

388 U.S. 915; cf. *United States* v. *Bayer*, 331 U.S. 532, 539–541.

2. Petitioner contends that the evidence does not support the verdict because Williams could not specify exactly how many plastic bags were in the iceboxes and there was no direct proof that petitioner transported the doves in interstate commerce. The jury, however, may draw reasonable inferences from the facts proved, and on appeal the evidence and inferences must be construed most favorably to the government. *Glasser* v. *United States*, 315 U.S. 60, 80. It was reasonable to infer from the testimony by Williams that he observed four cartons in the rear of petitioner's car and that petitioner possessed more than the maximum number of 48 doves permitted under the statute. Indeed, Williams himself, a hostile witness, drew this inference. Similarly the fact that petitioner asked for and received directions to get "out of town to Missouri" was sufficient to support an inference that he transported the doves in violation of the statute.

3. After petitioner's first conviction was reversed, the case was transferred to Fort Scott, Kansas, 100 miles from Kansas City, because of prejudicial publicity. The instant case was tried on June 20 and June 21, 1966. At the close of the evidence, petitioner moved for a mistrial on the ground of prejudicial publicity in the Kansas City newspapers. He introduced in the record a story appearing on page 4 of the Kansas City Star referring to petitioner as a gangland figure and one appearing on page 19 of the Kansas City Times on June 21 referring to the refusal of govern-

ment witnesses to answer questions (App. 214–215, 280–282). Petitioner asked in the alternative that the court declare a mistrial or examine the jurors separately as to their exposure to these articles (App. 215). The court declined to grant either request, noting that it would not assume that the jury had read the articles and that to grant petitioner's request might call the attention of the jurors to the matter (App. 216). The court of appeals properly found the judge's action justified in these circumstances. The jury, when first selected, had been instructed not to talk about the case or form an opinion until all the evidence was in (App. 141) and this admonition was repeated at adjournment (App. 202). The newspaper stories were in inside pages of Kansas City, not local, newspapers. The charge was not one which would itself arouse emotion. Insofar as the article referred to petitioner as a gangland figure, it did not add significantly to the efforts of petitioner's counsel to paint a picture of discrimination. He said in closing argument (App. 222):

> We have a person who is from another state, and for some reason, and there's no mystery about it, because he has been painted in the press as a "bad man," but there isn't any proof of it. * * *

The judge instructed the jury (App. 238):

> [Y]ou are to disregard any information about the case which may have been received from sources outside of this trial. If any of you have read any newspaper articles or heard any radio broadcasts or telecasts related to this case, I want to caution you particularly that you are to

> put any such information entirely out of your consideration of this case, and you are to confine your consideration solely to the evidence adduced in this trial.

This Court has recognized that in determining whether there has been "prejudice resulting from the reading by jurors of news articles concerning the trial * * * each case must turn on its special facts." *Marshall* v. *United States,* 360 U.S. 310, 312. The "special facts" of this case clearly distinguish it from the flagrant prejudicial materials to which the jury was exposed in *Sheppard* v. *Maxwell,* 384 U.S. 333, and the various decisions of the courts of appeals upon which petitioner relies (Pet. 13–15).

4. Petitioner contends that it was error for the trial court to allow the jury to separate for lunch during the course of its deliberation. It is, however, within the sound discretion of the trial judge to permit such separation. See *Hines* v. *United States,* 365 F. 2d 649 (C.A. 10); *Cardarella* v. *United States,* 375 F. 2d 222 (C.A. 8), certiorari denied, 389 U.S. 882. There is no reason to apply to Fort Scott, Kansas, the absolute rule against separation laid down in *United States* v. *D'Antonio,* 342 F. 2d 667 (C.A. 7), for the Seventh Circuit whose major business comes from Chicago.

5. During the conference on instructions petitioner objected both to the giving of any instruction on the failure of petitioner to testify and to the phrasing of the proposed instruction (App. 209–210). The court instructed the jury as follows (App. 238):

> The law does not compel a defendant in a criminal case to take the witness stand and test-

> ify, and no presumption of guilt may be raised, and no inference of any kind may be drawn, from the failure of a defendant to testify.
>
> The legal theory for this rule is immaterial so far as you are concerned, but the important and vital point for you, as jurors, is that a defendant has the unqualified right not to take the stand and you may not in any manner draw any inference against the defendant because he did not take the stand.

This fair instruction to the jury on the impermissibility of drawing any inference from petitioner's failure to testify did not constitute an unconstitutional comment on that failure. See *Griffin* v. *California,* 380 U.S. 609, 615, n. 6. The court may properly give such a charge even though it was not requested by the defendant or even if the defendant objects. See, *e.g., Chadwick* v. *United States,* 117 F. 2d 902 (C.A. 5), certiorari denied, 313 U.S. 585; *Smith* v. *United States,* 112 F. 2d 217 (C.A.D.C.) certiorari denied, 311 U.S. 663.

For the reasons stated above, we believe that the petition for a writ of certiorari presents no question warranting review by this Court. We have the duty, however, to advise the Court that on December 5, 1961, prior to the commission of the offenses here involved, petitioner was overheard by an electronic device installed by trespass in a commercial establishment. Petitioner was not the target of this electronic surveillance and he was overheard talking about matters totally unrelated to the instant case. We propose to make a disclosure to the district court in accord-

ance with the procedure which this Court prescribes in *Kolod* v. *United States,* No. 133, October Term, 1967, pending on the government's motion to modify; *Ivanov* v. *United States,* No. 11, this Term; and *Butenko* v. *United States,* No. 197, this Term. In view of the utter irrelevancy of this single overhearing to this limited offense we suggest that, in order not to delay the final disposition of this case, it would be appropriate for the Court to rule on the certiorari petition on the basis of the questions raised rather than to grant the petition on the basis of the overhearing. A ruling denying certiorari would be without prejudice to further proceedings in light of this Court's decision in *Kolod, Ivanov, and Butenko.* See the Government's Brief in *Scandifia* v. *United States,* No. 1290, October Term, 1967.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 271

CASSIUS MARSELLUS CLAY, JR.,
a/k/a MUHAMMAD ALI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-48a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on May 6, 1968. A petition for rehearing was denied on June 6, 1968. The petition for a writ of certiorari was filed on July 5, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the denial of petitioner's claims for Selective Service classification as a minister or conscientious objector had a basis in fact.

2. Whether reversal of petitioner's conviction was required because of alleged systematic exclusion of Negroes from membership on the local and state appeal boards which passed on petitioner's claims.

STATEMENT

After a jury trial in the United States District Court for the Southern District of Texas, petitioner, a well-known, former world heavyweight boxing champion, was convicted of knowingly and wilfully refusing to submit to induction into the armed forces, in violation of 50 U.S.C. App. 462(b). On June 21, 1967, he was sentenced to five years' imprisonment and a $10,000 fine (R. 277-278).[1] The court of appeals affirmed (Pet. App. 2a, 48a, 49a).[2]

The wilful and knowing nature of petitioner's refusal to submit to induction as ordered on April 28, 1967—the sole issue which the jury had to decide—is not in dispute (see R. 108-111, 115-116, 123-124,

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[1] "R." refers to the record of proceedings at trial; "F." will refer to petitioner's Selective Service file; "H.Tr." will refer to the transcript of a hearing before a Department of Justice hearing officer relating to petitioner's conscientious objector claim. A copy of each of these documents is on file with the Clerk of this Court.

[2] The history of petitioner's prior court actions seeking to avoid induction and trial is set forth in chronological fashion in the court of appeals' extensive opinion (Pet. App. 7a-11a).

133-139). At issue, however, is the propriety of petitioner's Selective Service classification of I-A, which the trial judge determined, from a review of petitioner's Selective Service file (admitted into evidence at R. 139), had a basis in fact (see Pet. App. 50a-54a, for the district court's oral findings).[3]

Petitioner registered with local Selective Service Board No. 47 in Louisville, Kentucky, on April 18, 1960. On March 9, 1962, he was classified I-A. On March 26, 1964, he was classified I-Y (a person not currently qualified for military service who would be qualified in time of war or national emergency; see 32 C.F.R. 1622.17) after a physical and mental examination (R. 179). On February 17, 1966, he was reclassified I-A after being considered again under newly promulgated and revised regulations. On February 18, 1966, the notice of this classification was mailed to petitioner and he was furnished the special form for making a conscientious objector claim. On February 28, 1966, the completed form was received by the local board. Petitioner requested a personal appearance before the board in connection with the change in his classification from I-Y to I-A. On March 17, 1966, after a personal appearance, the local board again classified petitioner I-A. Petitioner took a timely appeal to the Kentucky Appeal Board, which

[3] The trial judge informed the jury of his finding and instructed that the correctness of petitioner's draft classification was not to be considered by it (R. 260-261). As the court of appeals pointed out, and petitioner presumably agrees, this approach "was in exact conformity with the Supreme Court's teaching in *Cox* v. *United States*, 332 U.S. 442, 452, 453 * * *" (Pet. App. 42a).

reviewed petitioner's file *de novo* and, on May 6, 1966, tentatively determined that petitioner was not entitled to I-O (conscientious objector) status or to any lower classification (R. 180). Pursuant to 32 C.F.R. 1626.25, the case was referred to a Department of Justice hearing officer, who concluded that petitioner was sincere in his conscientious objector claim (see F. 226-254). The Department of Justice Conscientious Objector Section reviewed the evidence and, on November 25, 1966, recommended to the Kentucky Appeal Board that petitioner's request for I-O status be denied (F. 209-225). A copy of the recommendation was mailed to petitioner. On January 10, 1967, the appeal board notified petitioner that he was classified I-A.

On August 23, 1966, petitioner wrote to his local board and asserted, for the first time, that he was entitled to a IV-D (ministerial) exemption because he was a minister of the Nation of Islam. He claimed that he had functioned in that capacity since early 1964, but had theretofore been unaware of his rights to exemption as such (F. 429). On January 12, 1967, after reviewing petitioner's file, the local board denied the claim for a IV-D exemption and declined to reopen his classification. Shortly thereafter, General Hershey, the National Director of Selective Service, requested the local board to reopen petitioner's classification. On January 19, 1967, the board did so and again classified petitioner I-A. Petitioner appealed this classification and asked that the Appeal Board for the Southern District of Texas (where he then resided) hear the appeal. On February 15, 1967, the

Texas Appeal Board classified petitioner I-A after considering the claims for I-O or IV-D status. On February 24, 1967, General Hershey appealed the classification to the National Selective Service Board (the Presidential Appeal Board).[4] On March 6, 1967, the Presidential Appeal Board voted to classify petitioner I-A.

On March 14, 1967, petitioner was ordered by Local Board No. 47 to report for induction at Louisville, Kentucky, on April 11, 1967. Petitioner obtained a transfer of his induction to Houston, Texas. On March 29, 1967, Local Board No. 61 in Houston ordered petitioner to report there for induction on April 28, 1967 (R. 143-152, 181-182). Petitioner reported but refused to submit to induction. His indictment, trial and conviction for violation of 50 U.S.C. App. 462(b) followed.

It was stipulated at trial that one of the three members of the Presidential Appeal Board was a Negro (R. 192). No other member of any Selective Service board which determined petitioner's classification was a Negro. All decisions to classify petitioner I-A by the various local and appellate boards, including that of the Presidential Appeal Board, were unanimous (see Pet. App. 21a-23a).

ARGUMENT

1. It is well settled that the standard for judicial review of Selective Service classifications is the narrow one of whether or not there is a "basis in fact"

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[4] Petitioner could not take such an appeal under the pertinent regulations, since the state appeal board's decision had been unanimous (see 32 C.F.R. 1627.1, 1627.3).

for the classification. *Estep* v. *United States*, 327 U.S. 114; *Witmer* v. *United States*, 348 U.S. 375. The grounds for denial of petitioner's claims for ministerial or conscientious objector status amply satisfy this standard.

a. As indicated previously, petitioner first asserted that he was entitled to a IV-D ministerial exemption by a letter to his local board in August 1966, wherein he stated that he had become a minister of the Nation of Islam in early 1964. He submitted affidavits attesting to his ministerial activities and contended that since early 1964 he had devoted only ten percent of his time to boxing and ninety percent to his ministerial duties (see R. 201; F. 412-432). Between 1964 and August 1966, however, petitioner had consistently described his occupation on Selective Service forms as "professional boxer." His Current Information Questionnaire dated February 2, 1966, listed his occupation as a professional boxer and his work as "professional fighting" (F. 532). In a letter to his local board claiming a hardship deferment on February 14, 1966 (three days prior to his reclassification from I-Y to I-A), petitioner stated: "My occupation is professional boxer, and I am at present the Heavyweight Champion of the World" (F. 525). On March 17, 1966, petitioner wrote a letter protesting his reclassification on the ground that it imposed a severe hardship upon him "as heavyweight champion of the world" (F. 491). On various dates in 1966, prior to his assertion of a ministerial exemption, he wrote letters seeking the permission of his local draft board to leave the country to defend his boxing title (F. 458, 467, 474).

Even after the date of making of his claim for a ministerial exemption, petitioner continued to list his occupation on Selective Service forms as a professional boxer or prizefighter (R. 237). On October 19, 1966, he wrote his local board requesting permission to travel to Mexico to make arrangements for a fight and to observe an opponent (R. 241; F. 260). In a letter to his local board on January 25, 1967, he stated that he was "now in training for my bout with Ernie Terrell here in Houston" (F. 164; see generally Pet. App. 52a-54a).

As the court of appeals concluded, there was not only a basis in fact for denial of the claimed ministerial exemption, but the record showed that petitioner's "vocation is clearly that of a professional boxer" (Pet. App. 34a). Moreover, there is nothing in the record to indicate that petitioner is the leader of a congregation or of a group of lesser members of his sect. As this Court has held, the ministerial exemption is applicable only to the "leaders of the various religious faiths and not * * * the members generally." *Dickinson* v. *United States*, 346 U.S. 389, 394.

b. Petitioner's claim to be "conscientiously opposed to participation in war in any form" (50 U.S.C. App. 456(j)) was first made on February 18, 1966, one day after his reclassification to I-A, at which time he was given the special form for conscientious objectors (see Pet. App. 34a-35a). In the completed form as returned, and at the hearing before the Department of Justice hearing officer, petitioner indicated that the source of his conscientious objection to war stemmed

from his adherence to the beliefs of the Nation of Islam, or Black Muslims, of which sect he became a member in January 1964 (F. 215-217; H. Tr. 116). Assuming the sincerity of the claim, despite its late interjection immediately following petitioner's reclassification to I-A (see *Witmer* v. *United States*, 348 U.S. 375), the information developed at the hearing concerning the tenets of the Black Muslim faith, and thus the asserted basis of petitioner's alleged conscientious objector status, furnished ample grounds for denial of his claim.

Significantly, it was shown that the Nation of Islam does not teach a general scruple against participation in war, but rather a refusal to fight in wars on the side of white persons. See *Sostre* v. *McGinnes*, 334 F. 2d 906 (C.A. 2), certiorari denied, 379 U.S. 892; *Quotations from the Supreme Wisdom Containing the Teachings of Elijah Muhammad*, set forth at Pet. App. 37a, n. 4. Moreover, in regard to his religious beliefs, petitioner himself stated (H. Tr. 111-112; Pet. App. 39a-40a, n. 18):

> * * * I wouldn't turn down so many millions and jeopardize my life walking the streets of the South and all of America with no bodyguard if I wasn't sincere in every bit of what the Holy Qur'an and the teachings of the Honorable Elijah Muhammad tell us and it is that we are not to participate in wars on the side of nobody who—on the side of non-believers, and this is a Christian country and this is not a Muslim country * * *. [T]he outright, everyday oppressors and enemies are the people as a whole, the whites of this nation. So, we are not, according to the Holy

> Qur'an, to even as much as aid in passing a cup of water to the—even a wounded. * * *

In answer to a hypothetical question, petitioner said that he would fight in a war if advised to do so by Elijah Muhammad, leader of the Nation of Islam (H. Tr. 117). He admitted being correctly quoted by a Chicago newspaper on February 18, 1966, as saying (Pet. App. 40a, n. 18): "I am a member of the Muslims and we don't go to no war unless they are declared by Ali himself. I don't have no personal quarrel with those Vietcongs." Plainly, there was ample basis for finding that petitioner did not have a conscientious scruple to participation in all wars, but only to certain wars depending upon particular circumstances. Such a belief does not entitle the holder to conscientious objector status under the statute. *E.g.*, *United States* v. *Spiro*, 384 F. 2d 159 (C.A. 3), certiorari denied, 390 U.S. 956.[5]

2. Petitioner contends that Negroes were systematically excluded from the local and state appellate boards which passed upon his claims, and that this consideration should serve to nullify their decisions to classify him I-A and thus necessitates reversal of his conviction. This contention was properly rejected by

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[5] Petitioner raises a separate contention (Pet. 3) that the inclusion in the Selective Service file of letters and newspaper clippings unfavorable to him, and statements of General Hershey and Congressman Rivers, deprived him of due process in the determination by the Selective Service System of his conscientious objector and ministerial exemption claims. This contention is without merit for the reasons enumerated by the court of appeals (Pet. App. 48a, n. 23). There is no showing that any of the material or statements had the slightest influence on the Selective Service boards' determinations. See *Marcello* v. *Bonds*, 349 U.S. 302, 311-313.

the court below, which gave it extended consideration (see Pet. App. 12a-23a).[6]

The Universal Military Training and Service Act (50 U.S.C. App. 460(b)(3)), authorizing the President to establish local and appellate Selective Service boards, provides that:

> * * * Each local board shall consist of three or more members to be appointed by the President from recommendations made by the respective governors or comparable executive officials. * * * No member of any local board shall be a member of the armed forces * * *, but each member * * * shall be a civilian who is a citizen of the United States residing in the county or political subdivision * * * in which such local board has jurisdiction * * *. * * * Appeal boards within the Selective Service System shall be composed of civilians who are citizens of the United States and who are not members of the armed forces. The decision of such appeal boards shall be final in cases before them on appeal unless modified or changed by the President. The President, upon appeal or upon his own motion, shall have power to determine all claims or questions with respect to inclusion for, or exemption or deferment from training and service under this title * * *, and the determination of the President shall be final.

Moreover, Selective Service regulations provide that an appeal board shall normally consist of five members and that (32 C.F.R. 1604.22):

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[6] It shouuld be noted that the decision in the instant case on this point has recently been followed by the Second Circuit in *United States* v. *Prince*, No. 477 (C.A. 2, decided July 19, 1968).

> [It] should be a composite board, representative of the activities of its area, and as such should include one member from labor, one member from industry, one physician, one lawyer, and, where applicable, one member from agriculture.

All members of local and state appeal boards serve without compensation (32 C.F.R. 1603.3). The regulations also provide for the creation of a National Selective Service Appeal Board appointed by the President, which exercises the powers bestowed upon the Chief Executive by 50 U.S.C. App. 460(b)(3). By explicit regulation, the Presidential Appeal Board is independent of the Director of Selective Service (32 C.F.R. 1604.6(c)).

According to the Report of the National Advisory Commission on Selective Service,[7] submitted in February 1967, .2% of the local board members in Kentucky were Negro, as compared with a 7.1% Negro population, and 1.1% of local board members in Texas were Negro, as compared with a 12.4% Negro population (see Report, pp. 80-81). No member of a local or state appeal board which determined petitioner's Selective Service classification was a Negro.[8] One of

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[7] That report is part of the record of proceedings below (D. Exh. 1), and a copy of it is on file with the Clerk of this Court.

[8] On March 9, 1967, at a press conference, the President stated, when asked about the Report of the National Advisory Commission on Selective Service: "Unquestionably, in the field of the Selective Service boards and the draft machinery, as in the general machinery of Government at all levels, there has been discrimination against minority groups. I will do all I can to see that that is corrected. I don't believe

the three members of the Presidential Appeal Board, however, was a Negro.

Petitioner argues that local and appellate Selective Service boards are analogous to juries, whose verdicts may be set aside on a showing of systematic exclusion of an identifiable group or class made by a member of the group or class discriminated against in the jurors' selection. *E.g.*, *Hernandez* v. *Texas*, 347 U.S. 475. He urges that the dearth of Negroes on the local and appellate boards which determined his I-A classification should be accepted as proof of a systematic exclusion of Negroes from service on such boards, just as statistical evidence of gross underrepresentation of Negroes on a jury roll has been held to constitute prima facie proof of discrimination in the method of selection. See *Whitus* v. *Georgia*, 385 U.S. 545. The suggested analogy, however, is inapt.

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our people want to see that happen or want to see that continued."

On March 6, 1967, the Chief Executive had informed Congress that: "I am instructing the Director of the Selective Service to: * * * In conjunction with Governor Farris Bryant, Director of the Office of Emergency Planning to work with the governors to assure that all local boards are truly representative of the communities they serve and to submit periodic reports on the progress in this area." See Weekly Compilation of Presidential Documents, March 13, 1967, p. 395, on file with the Clerk of this Court.

By May 31, 1967, the President was able to advise a meeting of the state directors of the Selective Service System that they and General Hershey, working with the governors, had achieved "some progress" in making local boards more representative. See Weekly Compilation of Presidential Documents for the week in question, pp. 698-699, on file with the Clerk of this Court (see also Pet. App. 16a-17a).

The right to a trial in a criminal case by a jury chosen from a cross-section of the community is guaranteed by the Constitution. A large part of the community has the right and the duty to serve on juries. A gross imbalance of a particular race or class on a jury roll is thus strong evidence that the constitutional mandate for a jury representing a fair cross-section of the community has not been followed.

In contrast, the members of local and appellate Selective Service boards are selected by the President, on recommendation of the state governors. The number who serve is, by comparison to the number serving on juries, very small. The limited numbers involved and the fact that presidential discretion, rather than random lottery, is involved in the selection procedure renders reliance on statistics as a basis for showing racial prejudice unwarranted. Moreover, the selection effort is presumably at least partially directed toward finding the most qualified individuals for service on Selective Service boards, rather than picking by lot from among a group of persons who merely meet minimum requirements for such service. This is particularly true of appointments to the appeal boards which are designed to be representative as to a number of *activities* (*i.e.*, business, medicine, law, and agriculture) in which Negroes are, at present, greatly underrepresented.[9]

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[9] This is less true of appointments to the local boards, which the President has indicated are intended to be representative of the community as a whole (see note 8, *supra*). However, since all Selective Service registrants who are in a position to attack their classifications as a defense to a criminal prose-

To show systematic exclusion of a racial group where executive discretion in appointment has been exercised would, therefore, require calling the particular executive official as a witness and compelling him to testfy (or the equivalent by other forms of legal process) as to his reasons for selecting various individuals and rejecting others. Under the doctrine of separation of powers, such an inquiry would be wholly inappropriate—particularly where the presidential appointment power is involved and the judicial inquiry would focus on an alleged lack of integrity in the exercise of executive power. See *United States* v. *Morgan*, 313 U.S. 409, 422. It is for this same reason that petitioner's ancillary contention (Pet. 14-15) regarding the denial of his various applications for subpoenas and discovery is without merit (see Pet. App. 24a-28a).

The court of appeals, apparently acting on the assumption, *arguendo*, that systematic exclusion of Negroes from petitioner's local and state appeal boards had been proved, concluded that "a draft board system which does not have a sufficiently representative number of Negro members is comparable to a malapportioned legislature [the acts of which] are not invalid" (Pet. App. 19a). Since the court was attempting, in

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cution must have appealed their classification to their appeal board (see *Estep* v. *United States*, 327 U.S. 114, 123; *Falbo* v. *United States*, 320 U.S. 549, 552-553), which makes a *de novo* determination (see Pet. App. 21a-22a), even an assumed prejudicial composition of a registrant's local board would seem irrelevant to his conviction for a failure to obey an order to submit to induction.

our view, only to analogize the legal effect of the actions of the two bodies—as *de facto* in nature—and not their functions, we do not disagree. In terms of their functions and structure, however, Selective Service boards seem to us more akin to administrative agencies than to either legislatures or juries. Although their members serve without pay, such boards are nonetheless official bodies and service on them is a public office. The functions performed by the local and appeal boards in determining a registrant's proper classification under the Universal Military Training and Service Act are comparable to those performed by other agencies which administer particular congressional enactments. Challenges to the composition of such agencies, or to individual members thereof, are permissible only on grounds of personal bias or prejudgment. See *Accardi* v. *Shaughnessy*, 347 U.S. 260; *Federal Trade Commission* v. *Cement Institute*, 333 U. S. 683, 700-703.[10] Here there was no showing of bias or prejudgment. As the court of appeals found (Pet. App. 23a):

> There are conclusory allegations that the absence of Negroes from local and appeal boards (other than the Presidential Appeal Board) in and of itself establishes discrimination. But we have been unable to find any evidence which shows in the slightest particular that the treatment accorded Clay (Ali) by any board or member thereof was different from that given to any other registrant.

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[10] Compare, as to federal judges, 28 U.S.C. 144, 455.

In any event, as the court below held, any defect in the process of petitioner's classification by the local and appeal boards resulting from the absence of Negroes thereon was cured by the action of the Presidential Appeal Board. Like the state appeal boards, the determination by the Presidential Appeal Board is based upon a *de novo* examination of the registrant's Selective Service file. See Note, *The Selective Service*, 76 Yale L.J. 160, 172 (1966). Review by that board, on which there was no racial imbalance, thus superseded all prior classifications and established the validity (as against the present argument) of petitioner's I-A classification. See *Falbo* v. *United States*, 320 U.S. 549, 555 (Rutledge, J., concurring); *DeRemer* v. *United States*, 340 F. 2d 712, 719 (C.A. 8); *Cramer* v. *France*, 148 F. 2d 801, 804-805 (C.A. 9); *United States* v. *Chodorski*, 240 F. 2d 590 (C.A. 7), certiorari denied, 353 U.S. 950.[11]

[11] Petitioner's further contention that his classification as I-A and conviction for failure to submit to induction constituted a bill of attainder (Pet. 3) was amply answered by the court of appeals' discussion of this point (see Pet. App. 41a-48a), and petitioner places little reliance presently on that claim.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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317-347—68——1

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 317

AMERICO DI PIETTO, ERNEST INFELICE, JAMES MIRRO, FRANK SANTUCCI, AND ROBERT J. MCDONNELL, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on May 17, 1968. A petition for rehearing was denied on June 20, 1968. The petition for a writ of certiorari was filed on July 19, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the insertion of the amount, payee, date and name of the sender on American Express money orders constitutes the false making, forgery, or alteration of a security within the meaning of 18 U.S.C. 2314.

2. Whether the trial judge committed reversible error in his treatment of a note from the jury.

3. Whether there was prejudicial error in evidence elicited and comments by the prosecutor which the trial judge instructed the jury to disregard.

STATEMENT

Petitioners were convicted by a jury in the United States District Court for the Northern District of Illinois of conspiracy to transport falsely made, forged, altered or counterfeit securities in interstate commerce, in violation of 18 U.S.C. 2314. Petitioners other than McDonnell were sentenced to five years' imprisonment; McDonnell was sentenced to two years' imprisonment. The court of appeals affirmed (Pet. App. A).

The sufficiency of the evidence is not in issue. It showed that, in May 1961, petitioner Santucci stole 148 American Express money orders from a store where they were held for sale to customers. The money orders, which were payable in New York, bore an imprinted signature on behalf of American Express Company and were stamped with the words "not payable for more than one hundred dollars." The spaces for amount, payee, date, and sender's name and ad-

dress were blank at the time the orders were stolen (Pet. App. 2).

Petitioners DiPietto and Infelice, with the knowledge and consent of Santucci and petitioner Mirro, arranged with one Ackerman, an unindicted co-conspirator and the principal government witness, to pass the money orders (D. App. 39, 42–44, 53, 180–181).[1] In June 1961, Ackerman sought the aid of petitioner McDonnell, who in turn later enlisted one O'Connor to handle the money orders (D. App. 47–48). Ackerman delivered the money orders to O'Connor in St. Louis, and O'Connor took them to Kansas City, Missouri, where he, another unindicted co-conspirator named Lent, and Lent's wife filled in about eighty of the orders. Mrs. Lent wrote in the sender's name as W. R. Stanley of Chicago and the payee as Henry L. Stanley. Lent typed in the amount of $100 on each order, and O'Connor used a copying machine and Lent's documents to make out false identity papers in the name of Henry L. Stanley (D. App. 53–54, 161–162).[2]

Lent then went to Springfield, Missouri, where he cashed several of the orders before being arrested. He telephoned O'Connor from the police station, and told him what had happened. O'Connor fled to Michigan City, Indiana, and Chicago, and was for a time in contact with some of the petitioners. The remaining

[1] "D. App." refers to the joint appendix of the defendants containing excerpts from the testimony at trial. A copy of this appendix is on file with the Clerk of this Court.

[2] A replica of one of the money orders as filled out and cashed appears at Pet. App. D.

money orders were subsequently returned to petitioner Di Pietto (D. App. 56–61, 70–73, 163–165).

ARGUMENT

1. Petitioners contend that the stolen money orders—on which co-conspirator Lent and his wife had inserted the amount, date, name and address of sender, and payee—were not the type of forged security contemplated by 18 U.S.C. 2314. Petitioners' theory (Pet. 10) is that only a "falsely made" security is reached by the statute, and that since the name of the American Express Company as primary obligor on the money orders had already been attached at the time they were stolen, the fraudulent completion of the instruments did not constitute a false "making". That theory unduly restricts the intended operation of the statute.

The conduct proscribed by the statute includes not only the interstate transportation of a "falsely made" security, but also the transportation of "forged" and "altered" securities—categories which apply to genuinely issued instruments as well as those which have been counterfeited. See *Hall* v. *United States,* 372 F. 2d 603, 608–610 (C.A. 8). At common law, the term forgery embraced the alteration of any material portion of a writing "to the prejudice of another man's right." See *Gilbert* v. *United States,* 370 U.S. 650, 657. That definition is broad enough to encompass the fraudulent completion of the American Express money orders involved here. Since there is no indication that Congress intended to adopt a nar-

rower defintion of the term "forged" in 18 U.S.C. 2314 (see S. Rep. No. 674, 76th Cong., 1st Sess.), the term must be deemed to have been used in its ordinary, common-law sense. See *Gilbert* v. *United States, supra,* 370 U.S. at 655.

In *Streett* v. *United States,* 331 F. 2d 151 (C.A. 8), relied on by petitioners, the court held that the false countersignature of the purchaser's name on previously issued travelers checks did not render the checks "falsely made or forged" securities within 18 U.S.C. 2314. The court relied on this Court's holding in *Prussian* v. *United States,* 282 U.S. 675, that the false endorsement of the payee's name on a fully completed and validly issued government draft did not constitute forgery of the draft under 18 U.S.C. 471 (then 18 U.S.C. 262). The statute involved in *Prussian,* however, applied only to government obligations or securities, and the Court found that its purpose was "the protection of the bonds or currency of the United States, and not the punishment of any fraud or wrong on individuals" (282 U.S. at 678). Section 2314, on the other hand, is designed to aid the States in the enforcement of their laws against the forging or counterfeiting of private commercial securities by prohibiting the interstate transportation of such securities. See *United States* v. *Sheridan,* 329 U.S. 379. Moreover, the Court also held in *Prussian* that the false endorsement of a government draft could be prosecuted under a separate statute (now 18 U.S.C. 495). 282 U.S. at 679–680. No comparable statute is available with respect to nongovernmental securities. See *Streett* v. *United States, supra,* 331 F. 2d at 154.

While the soundness of the court's decision in *Streett* is not free from doubt,[3] that case is distinguishable on its facts, as the court below correctly held, from the present case (Pet. App. 5). In *Streett*, as in *Prussian*, all that was done was to countersign or endorse instruments which had been regularly issued for a specified amount. In this case, the money orders did not purport to evidence an obligation of American Express to pay a specified amount to any person until they were falsely completed, in their entirety, by petitioners' co-conspirators, to the prejudice of the primary obligor.

2. Petitioners contend that the trial court committed reversible error in its treatment of a note from the jury indicating that they had reached an impasse. The facts are set forth in detail in the opinion of the court below (Pet. App. 5–7). Upon being informed of the note, the judge, who was attending a judicial conference, sent a message to the jury instructing them "to continue their deliberations." In view of the court's previous instructions that the jury was not required to reach a decision (Pet. App. 6), the direction to continue their deliberations was not coercive. While the better practice would have been to reply to the jury's note in the presence of petitioners and their counsel, the court below properly found that any error was harmless. *United States* v. *Grosso*, 358 F. 2d 154 (C.A. 3), reversed on other grounds, 390 U.S. 62.

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[3] See La Buy, *Manual on Jury Instructions*, 36 F.R.D. 457, 675–678.

3. Petitioners have combed the record to place in juxtaposition instances in which the court instructed the jury to disregard certain evidence or comments so as to suggest that there were "repeated prejudicial comments and actions by the prosecutor" which cumulatively could not be erased from the jury's mind. In context, however, the separate matters which the judge instructed the jury to disregard were minor events in a hotly contested trial, and, as the court below correctly held, there was no cause for a mistrial.[4]

a. The indictment charged that the conspiracy continued after the arrest of Lent and that the defendants committed acts of concealment in furtherance of the conspiracy (see D. App. 22–24). Ackerman testified that in late June 1961, after Lent had been arrested and O'Connor had fled, he was summoned to a meeting with petitioners Mirro, Di Pietto, and Infelice, at which Lent and O'Connor were discussed (D. App. 59–60). Mirro pointed out that O'Connor "is the only guy that can put us in the penitentiary" (D. App. 60). He stated (D. App. 61), "There is only one way to handle it. * * * It has been my experience over a long time that you have got to bury some-

[4] Contrary to petitioners' contention, this case does not present any question of the applicability of *Bruton* v. *United States*, 391 U.S. 123. *Bruton* held that the inherent prejudice flowing from a co-defendant's confession implicating the defendant could not be cured by a limiting instruction that the confession should not be considered against the defendant who did not make it. There is no comparable inherent prejudice arising from the routine instances involved here of the elicitation of inadmissible evidence or the making of an improper remark (391 U.S. at 135).

body who can bury you and put you in the penitentiary." The prosecutor referred to this testimony several times in closing argument (D. App. 282–283).

Ackerman testified that on another occasion, while riding with Mirro in a car, Mirro pointed out a farm on the side of the road and said (D. App. 69), "That's Jack McGurn's private cemetery. That's where he used to bury all the guys he hit. That's where O'Connor ought to get buried." An objection was sustained. At the conclusion of Ackerman's direct examination, defense counsel moved for a mistrial and to strike all of Ackerman's testimony post-dating the arrest of Lent. The court denied the motion but instructed the jury to disregard the reference by Mirro to McGurn's "cemetery" (D. App. 74–75, 282). That testimony was not alluded to thereafter by the prosecutor.

Ackerman's testimony that Mirro wanted to "bury" O'Connor was proper evidence against petitioners. Their part in the conspiracy had not been terminated by the arrest of Lent and the flight of O'Connor. They were acting together to determine how to revise their plans in view of the arrest. Indeed, after the above incidents, O'Connor, at Ackerman's direction, returned to Michigan City, Indiana, to retrieve the remaining money orders. O'Connor gave them to Ackerman, who gave them to Di Pietto. When Di Pietto received the money orders, he stated (D. App. 72–73): "I think we can use what's left." The single reference to McGurn's cemetery added little to the evidence properly admitted. There is nothing to indicate that the prosecutor deliberately elicited that testimony, to which no

further reference was made. And there is no reason to believe that the jury could not follow the trial court's instruction to disregard it.

b. F.B.I. agent Stephan testified for the government regarding two interviews he had had with petitioner McDonnell, at which McDonnell denied all participation in the crime. On cross-examination, McDonnell, an attorney who conducted his own defense, asked (D. App. 219), "Isn't it a fact, Mr. Stephan, that I asked you to submit me to a lie test concerning these * * * ?" The prosecutor's objection was overruled, and the witness thereafter testified that McDonnell had asked to be given a lie detector test but that his request was refused. On redirect examination, the prosecutor asked (D. App. 222), "And Mr. McDonnell wasn't given a lie test because they don't mean anything, isn't that right?" The trial judge sustained an objection to the question, stating "Lie detector tests are not admissible in evidence in this jurisdiction, and the jury will disregard the question."[5] Since petitioner McDonnell had opened up the inquiry, the prosecutor's question cannot be considered a deliberate attempt at impropriety. The court's instruction to disregard the question, coupled with the explanation, removed any prejudice.

c. Kalady, who had been in protective custody with Ackerman at the Cook County witness quarters, was called by petitioner Mirro and testified that, at Ackerman's suggestion, he had invented a false story

[5] The entire colloquy following the prosecutor's question is set forth at Pet. 19.

about being a witness to a murder in order to influence the authorities to drop some of the charges against him (D. App. 244–246). On cross-examination, petitioner McDonnell asked (D. App. 252), "Mr. Kalady, as a matter of fact, you fully expect and have been told that you will be a government witness in other cases, haven't you?" The prosecutor stated, "I object. Not any more." The trial judge sustained the objection. Defense counsel then moved for a mistrial on the basis of the prosecutor's remark, which the court apparently had not heard. The court denied the motion and instructed the jury to "disregard [the prosecutor's] comment. It has no bearing on this case and you will disregard it completely." The prosecutor apologized in open court for the remark. See Pet. 19–20.

While the comment was "unnecessary and irrelevant" (Pet. App. 10), it was not prejudicial. Petitioner McDonnell's question itself was obviously improper, as the trial court ruled, since it implied that the government was prepared to use Kalady, a self-admitted liar, as a witness in future cases. The prosecutor apparently felt compelled to make known the government's disavowal of Kalady in order to dispel the prejudice from McDonnell's question. Moreover, Kalady was called by Mirro only for the purpose of attacking Ackerman's credibility. As petitioners point out (Pet. 20–21), Ackerman's credibility had already been brought under heavy attack by a showing of his "unsavory" past and the charges against him pending at the time of trial (Pet. App. 8).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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AUGUST 1968.

U.S. GOVERNMENT PRINTING OFFICE: 1968

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 474

PASQUALE A. NATARELLI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on July 30, 1968. Mr. Justice White extended the time for filing a petition for a writ of certiorari to and including September 1, 1968, and, on September 3, 1968, the petition was filed.[1] The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] September 1 and 2 were a Sunday and a legal holiday respectively.

321-444—68

QUESTIONS PRESENTED

1. Whether there was a prejudicial variance between the proof and the indictment.

2. Whether an intent to affect commerce is a necessary element of a conspiracy to obstruct commerce by robbery.

3. Whether a conspiracy to transport stolen goods in interstate commerce can be formed prior to the theft of the goods.

4. Whether the district court erred in determining for itself, after an *in camera* inspection, that records of an electronic surveillance were irrelevant to the prosecution.

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioner and four other individuals[2] were convicted of conspiracy to obstruct commerce through the robbery of Armored Transport, Inc. of Los Angeles, California, in violation of the Hobbs Act, 18 U.S.C. 1951. Petitioner and the same individual defendants were also convicted under a separate count of conspiracy to transport in interstate commerce goods of the value of $5,000 or more knowing them to be stolen, in violation of 18 U.S.C. 2314. This second conspiracy embraced both a plan to rob Mrs. Carole McCune of jewelry and a plan to rob Armored Transport, Inc. On December 11, 1967, petitioner was sentenced to imprisonment for twenty years on the first count and five

[2] Charles Caci, Stephen Cino, Frederico Randaccio and Louis Sorgi were also convicted.

years on the second count, the sentences to run concurrently.

The government's evidence, recounted in detail by the court below (Pet. 2–7), may be summarized briefly. On December 29, 1964, Pascal Calabrese robbed the City Hall in Buffalo, New York, and then went into hiding (R. 377, 385). Defendant Stephen Cino subsequently arranged for Calabrese to meet petitioner and defendant Frederico Randaccio to discuss participation in prospective robberies in California (R. 186–187, 190–191). On the evening of February 5, 1965, the meeting took place at petitioner's house in Buffalo. Plans for two robberies in Los Angeles were discussed: first the robbery of Mrs. Carole McCune at the Beverly Hilton Hotel of $400,000 in jewelry and thereafter the robbery of an armored truck messenger who picked up the daily receipts at the hotel (R. 191–198). It was agreed that Cino would "fence" the jewelry before returning with the proceeds to Buffalo. Thereafter, petitioner and Randaccio gave Calabrese money to cover his expenses (R. 199–200). On February 7, 1965, Calabrese went to Los Angeles where he was met by defendant Charles Caci (R. 201–203). On February 10, 1965, Caci and Cino went to the home of Louis Sorgi, the person in charge of security at the Beverly Hilton Hotel, and planned the robberies with him (R. 207–208, 212–220). The following day, Calabrese and Sorgi visited the hotel suite which they expected Mrs. McCune, the owner of the jewelry, to occupy. They also studied the tunnel used by the armored

car messenger (R. 223–231). Calabrese then studied his escape route with Caci and Cino (R. 233–235). Both Sorgi and Caci had master keys for the hotel (R. 235).

When Mrs. McCune did not arrive at the hotel as expected, Sorgi telephoned her and discovered that she was ill (R. 241–243, 1099–1100). On February 17 Cino was called back to Buffalo after Calabrese's connection with the City Hall robbery became known (R. 250, 254–255). Calabrese left Los Angeles on the following day, and shortly thereafter surrendered himself to the authorities in Buffalo (R. 261–263).

ARGUMENT

1. Count one of the indictment charged that in February 1965 the defendants conspired to "obstruct, delay and affect commerce and the movement of money in commerce, by robbery, that is the unlawful taking * * * of money and property belonging to and in the care, custody * * * and possession of Armored Transport of Los Angeles, Inc." Petitioner argues that there is a prejudicial variance between the proof and the indictment, in that the evidence showing that a successful robbery of the armored car messenger would have interfered with the movement of out-of-town bank checks and traveler's checks in commerce does not fit within the allegations charging conspiracy to obstruct the movement of money in commerce (Pet. 15–17). Obviously, however, an interference with the interstate movement of checks would affect the movement of money. This contention

was, therefore, properly rejected as "frivolous" by the court below (Pet. 7).

2. Petitioner also contends that, since the robbery was not consummated, the court erred in instructing the jury as to count one that it was not necessary that the defendants intended that the carrying out of the conspiracy would have affected commerce. The purpose of 18 U.S.C. 1951, however, is to proscribe a category of criminal conduct which has a deleterious effect on commerce irrespective of the intent in that regard of the perpetrators of the crime. The statutory requirement is satisfied if, as here, the conspiracy's success would have affected commerce. *Nick* v. *United States,* 122 F. 2d 660, 673 (C.A. 8), certiorari denied, 314 U.S. 687; *United States* v. *Varlack,* 225 F. 2d 665, 672 (C.A. 2); *United States* v. *Pranno,* 385 F. 2d 387, 389–390 (C.A. 7), certiorari denied, 390 U.S. 944. As this Court stated in *Stirone* v. *United States,* 361 U.S. 212, 215, the Hobbs Act manifested "a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery or physical violence."

3. Equally without substance is petitioner's challenge to count 2 of the indictment on the ground that a conspiracy to transport stolen goods and money in interstate commerce cannot exist prior to the theft of the goods and money. The partial execution of a substantive offense has never been considered to be a prerequisite to a conspiracy charge. Such a limitation would seriously impair the legislative policy

underlying the prohibition of criminal conspiracies, since "the danger which a conspiracy generates is not confined to the substantive offense which is the immediate aim of the enterprise." *Callanan* v. *United States*, 364 U.S. 587, 594.

4. Prior to trial, the government advised the defense that petitioner and defendant Randaccio had been on premises subject to an electronic surveillance and were participants in conversations that were overheard during the period of time covered by the instant indictment and two other indictments then pending in the district court (Pet. 21–22; R. 2811(6)). By affidavit, the government denied that it had obtained any evidence or leads to any evidence from the surveillance (Pet. 21–25; R. 2629–2630). Upon the basis of this representation, the district court, over defense objection, ordered a post-trial hearing on the issue of taint (Pet. 26–27; R. 2643–2644). Thereafter, the defense petitioned the court of appeals for a writ of mandamus directing that such a hearing be held prior to trial (Pet. 27–28). On October 4, 1967, this request was denied by the court of appeals, which noted in its *per curiam* opinion that the government had agreed to make available the logs of the electronic surveillance during any relevant period (Pet. 29). On October 6, 1967, at a pre-trial conference in the district court in which petitioner's counsel participated, counsel for defendant Randaccio indicated that such a relevant period would be a six-month period, extending either from three months before the period covered by the indictment to two months thereafter, or from two months before to three months after the indict-

ment period (October 6, 1967, Tr. 24–25, 8–9).[3] The district court then examined the logs of the electronic surveillance covering three months prior to the indictment period, the indictment period, and thereafter to the cessation of the surveillance. It also examined the entire government file (R. 2813–2815). It turned over to petitioner and defendant Randaccio the surveillance logs of February 1965, the indictment period (R. 1568–1570).[4] At a post-trial proceeding, the court, finding the additional logs "totally irrelevant and immaterial" to the instant prosecution, declined to turn them over.[5] It pointed out that third parties could be affected by the disclosure (R. 2813–2815). It also concluded, following a further hearing, that the government's case was developed from wholly independent sources (R. 2931(94)–2931(96)).

Although petitioner raised no issue based on this electronic surveillance in his direct appeal in the court of appeals, he argues, relying on *Alderman* v. *United States,* No. 133, October Term, 1967 (motion to amend the order of remand set down for reargument), that he should have been given all of the material that the government had in its possession concerning this surveillance. However, the district court has already conducted an *in camera* inspection

[3] We are lodging the transcript of this conference with the Clerk of the Court.

[4] A stipulation as to the content of part of these logs was introduced into evidence as part of defendant Randaccio's defense (R. 1997).

[5] At the post-trial proceeding, counsel for defendant Randaccio also requested that all additional logs, rather than merely those for the previously requested six-month period, be turned over to him (R. 2811(24)).

of the logs covering the period of time which petitioner initially thought might be relevant. Indeed, after the trial, that court reaffirmed its ruling in regard to inspection, at a time when the trial judge was familiar with all the evidence used at the trial. The district court found that the logs now requested did not contain any material relevant to the prosecution. If petitioner was not satisfied with this procedure, he should have challenged it in the court of appeals. In the absence of "exceptional circumstances," this Court has consistently refused to consider an issue not raised in the court below. See, *e.g., Lawn* v. *United States,* 355 U.S. 339, 362, n. 16. We suggest that where, as here, the disclosure of the electronic surveillance was made prior to the trial, such circumstances are not present.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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OCTOBER 1968.

U.S. GOVERNMENT PRINTING OFFICE: 1968

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322-921—68

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 546

JAMES R. HOFFA, THOMAS EWING PARKS AND LARRY CAMPBELL, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 398 F. 2d 291. The opinion of the district court (Pet. App. B) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on July 23, 1968. On August 12, 1968, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to September 21, 1968, and the petition was filed on September 20, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, on the date set for an evidentiary hearing on petitioners' fourth motion for a new trial filed three months before, the court properly denied requests for a ninety-day continuance or non-prejudicial dismissal of the motion, sought on defense counsels' unelaborated statement that certain information had come to their attention which would make it improper to proceed.

2. Whether the trial court properly excluded from the scope of the proposed evidentiary hearing various matters as to which petitioners failed to allege facts which could support a motion for a new trial.

STATEMENT

After a jury trial in the United States District Court for the Middle District of Tennessee in 1964, petitioners were convicted of jury tampering in connection with a 1962 criminal case against petitioner Hoffa. The court of appeals affirmed (349 F. 2d 20), as did this Court in December 1966 (385 U.S. 293). The present petition involves the fourth motion for a new trial filed by petitioners in connection with this case.[1]

[1] The first motion for a new trial, made immediately after the verdict (the denial of which was reviewed with the main appeal), set forth numerous alleged errors, including alleged misconduct of the jury. The second motion, filed in December 1964, while the main case was pending in the court of appeals, alleged denial of Sixth Amendment rights in the investigation of the case. The denial of this motion was affirmed: 376 F. 2d 1020, certiorari denied, 389 U.S. 859. The third motion, filed shortly after affirmance of the main case on appeal, alleged misconduct of the jurors and trial judge and also sought dis-

Subsequent to the affirmance of petitioners' convictions by this Court, they filed a motion here, supported by affidavits, alleging that they were entitled to have the judgment set aside by reason of claimed governmental electronic eavesdropping, wiretapping, and other intrusions. Following the government's response, this Court denied the motion on February 27, 1967 (386 U.S. 940), and, on the same day, denied rehearing of the case (386 U.S. 951). The next day petitioners filed in the district court the instant motion for a new trial, making the same allegations as in this Court with respect to wiretapping and electronic eavesdropping. The district court determined that the motion raised issues of fact and ordered an evidentiary hearing (App. 183a).[2] At petitioners' request, this hearing was set for May 8, 1967 (App. 188a), although the government asked for an earlier date (App. 248a).[3] The court indicated that the hearing would embrace "all issues of fact raised by the pending motion for new trial and any amendment thereto or that may be defined by further orders of the Court" and gave petitioners the opportunity to amend their motion by April 3, 1967, to include "any and all other matters of which they have knowledge that might

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qualification of the trial judge to hear the motion, based upon his alleged remarks to a prostitute. The denial of this motion was affirmed. 382 F.2d 856; certiorari denied, 390 U.S. 924.

[2] "App." refers to petitioners' appendix in the court below, containing substantial excerpts from the relevant proceedings. We are lodging a copy of this appendix with the Clerk of this Court.

[3] The hearing was later continued one day at the government's request (App. 232a).

affect the validity of the criminal judgment and their respective sentences herein" (App. 187a–188a).[4]

A pretrial conference was held on April 21, 1967, to define the issues for the hearing (App. 188a). The court ruled (App. 240a) that it would receive evidence on the issues raised by the following affidavits filed by petitioners, which were contested by affidavits filed by the government.

1. An affidavit of one Benjamin Nichols, who alleged that shortly before the trial began he personally installed electronic eavesdropping devices in the Chattanooga hotel suite occupied by petitioner Hoffa and his attorneys, tapped the telephones in the same suite, and then kept himself available in Chattanooga to service these devices during the trial. Nichols said that these activities were accomplished at the direction of Walter Sheridan, then a Special Consultant to the Attorney General of the United States (App. 37a–42a, 35a–36a).[5]

2. Affidavits of Herman Frazier, Alfred Paden, Albert Cole and Hazel Fulton, all of whom alleged that, during the government's investigation of the case, Walter Sheridan had played to them tape recordings of conversations between petitioner Hoffa and his attorneys (App. 61a, 66a, 67a, 70a, 72a, 101a, 102a).

3. Affidavits of William Loeb and I. Irving Davidson, who claimed that they were told by Cartha De-

[4] An amendment to the motion was filed on that day (App. 189a).

[5] Nichols also claimed that shortly before the trial he installed similar devices on the tenth floor of the Read House Hotel in Chattanooga, where the jury was sequestered during the trial (App. 39a, 198a).

Loach (Assistant Director of the Federal Bureau of Investigation), and John J. Hooker, Sr. (one of the prosecutors), that the government had wiretapped petitioner Hoffa (App. 56a, 52a).

The court also ruled that the following materials filed by petitioners presented no factual issues which could bear on the instant trial (App. 241a):

1. An affidavit by Paul Quaglia that, in late 1962 and in 1963, while employed by the Detroit Police, he had monitored a wiretap on the telephone of William E. Bufalino, an attorney for Hoffa, and had overheard Bufalino telling his wife about strategy involving Hoffa (App. 83a–85a). Quaglia stated that he "was under the belief that these wiretaps were for the Federal Government." The court held that this expression of opinion, unsupported by any allegation of fact, failed to establish any involvement of the federal government (App. 241a).

2. Allegations of eavesdropping prior to the commission of any offense by any defendant (App. 242a). This ruling referred to an affidavit by Bufalino that in November 1961, an electronic transmitter was found in the Florida hotel room of James Haggerty, Sr., an attorney for petitioner Hoffa, while Bufalino and Haggerty were discussing a pending federal case against Hoffa in Florida.

3. Allegations concerning the fact that the Solicitor General had revealed to the Supreme Court that Charles O. Brien, convicted of a customs violation in Detroit, had been overheard once talking about his own case and a second time with his attorney regarding the territorial conditions of his bond (App. 119a–

121a). An affidavit of Bufalino alleged that this conversation was with an attorney who was one of Hoffa's lawyers (App. 108a). The court noted that there was "a total absence of any allegation of facts" which would relate such recordings to any defendant in the instant case (App. 242a).

On the morning of May 9, 1967, before the hearing was to begin, the parties met in chambers at the request of petitioners' counsel. At that time, they made the following statement (App. 247a):

> Mr. SHENKER: We called this conference or requested this conference for the following reasons:
>
> Within the last several days certain information has come to us, to our attention. This information is of such a nature that we feel that it would be improper for us to proceed with our motion at this time, with the motion that is pending.
>
> I have communicated this information to my client, Mr. James R. Hoffa, and am authorized on his behalf, with all of the other defendants joining, and counsel for all of the other defendants agree, to ask this Court that this matter be continued for a period of 90 days.
>
> Counsel and the defendants feel that to proceed without being fully informed on the matters that were brought to our attention within the last few days would be most improper.

When the District Court told petitioners' counsel that, on the state of the record, it could "see no basis for granting a motion for continuance" petitioners' counsel stated, "[w]e cannot proceed." He then made no further disclosure to the court (App. 248a). The

court then adjourned the conference and the case was called in open court (App. 253a). At that time, the motion for continuance was renewed (App. 255). The court said that since "the nature of that motion is not in any way disclosed" the motion would be denied (App. 258a). Petitioners' counsel then asked the court to dismiss the motion without prejudice, "giving the same reasons that we have given for the motion for continuance" (App. 258a).

In overruling this motion, the court noted, "[t]his matter has been pending now for several months and the hearing date set for today was the date which was requested by counsel for the defendants after the court had suggested an earlier date" (App. 261a). Petitioners were then asked to proceed with their evidence, but they refused (App. 261a). Their counsel stated that if certain of the information which they had received were verified, portions of the instant motion might be withdrawn (App. 264a). The court stated that it saw no reason why petitioners "should not proceed with the other phases of the case" (App. 265a). Petitioners, however, declined to produce any evidence on any aspect of their motion.

On May 10, 1967, the court denied petitioners' motion for a new trial with prejudice, stating (App. 276a):

> The action of counsel for the defendants in declining to call the witness when afforded the opportunity to do so would reasonably indicate to the Court that such counsel may have learned of matters in their preparation for the hearing which caused them to be unwilling to further assert or vouch for the truth of the matters set

forth in the affidavits filed in support of the motion. Should this be the case, while it would be commendable for counsel to decline presenting matters unto the Court as true when in fact they have no belief in the truth of the matters, it would likewise be regrettable that the investigation leading to this conclusion was not undertaken and completed prior to the filing of the affidavits in the United States Supreme Court and in this court.

ARGUMENT

1. The trial judge acted well within his discretion in refusing to grant a ninety-day continuance or to dismiss petitioners' motion without prejudice. Petitioners not only failed to disclose the nature of the information which they represented had come to their attention, but also declined to reveal the circumstances which forbade such disclosure. Petitioners clearly had the burden of establishing their right to a new trial. See *Adams* v. *United States,* 317 U.S. 269, 281; *Darcy v. Handy,* 351 U.S. 454, 462. Having been offered ample opportunity to present their evidence and having refused to do so, there was no reason for the court to grant petitioners a lengthy continuance or to allow the motion to be dismissed without prejudice.

2. Nothwithstanding the fact that they refused to introduce any evidence at the hearing, petitioners argue that the trial court erred in excluding certain matters alleged in their motion from the scope of the proposed hearing. As the court of appeals held, however (Pet. App. A, 17), the matters stricken were on their face insufficient to require the taking of testimony.

a. The claimed electronic eavesdropping involving James Haggerty's Florida hotel suite was alleged to have been discovered in 1961, long prior to the offense charged in the instant indictment. Thus, it could not affect the present case. Moreover, it was obviously not "newly discovered". In addition, at no time has any contention been made that the alleged device was installed or maintained by the federal government.

b. There was no factual allegation that the federal government had any connection with the alleged wiretapping of William Bufalino's telephone by the Detroit Police Department. Affiant Quaglia's stated "belief" that the city was acting for federal authorities lacks any factual support. There was thus nothing which would warrant a hearing. *Nardone* v. *United States,* 308 U.S. 338; cf. *Taylor* v. *United States,* 229 F. 2d 826, 832 (C.A. 8), certiorari denied, 351 U.S. 986.

c. The government's disclosure in *O'Brien* v. *United States,* 386 U.S. 345, that two conversations of Charles O'Brien had been overheard by the F.B.I. on an electronic device could not possibly have had any effect on petitioners' convictions. As previously indicated by the government (see *O'Brien, supra,* at pp. 345–346), the conversations dealt with O'Brien's forthcoming trial for a customs violation and the conditions of his release on bail and thus were utterly irrelevant to the present charge.

3. As noted above, the allegations contained in petitioners' present motion for a new trial and the affidavits filed in support thereof are virtually identical

to those set forth in the "Motion for Relief Because of Wiretapping, Electronic Eavesdropping and Other Intrusion" filed by petitioners in this Court shortly after the Court affirmed their convictions. At that time we advised the Court that we had investigated this matter and determined that petitioners' allegations "that there was electronic eavesdropping or wiretapping by agents of the federal government (or at their request) on petitioners' premises or telephones, on the premises or telephones of their attorneys, or on the premises occupied or the telephones used by the jury, are without foundation in fact." Memorandum for the United States in Opposition to Petitioners' "Motion for Relief." *Hoffa* v. *United States,* No. 32, Oct. 1966, p. 9. When the present motion was made in the district court, the government supported the above statement by submitting affidavits which contradicted all of the material allegations contained in the affidavits submitted by petitioners (App. 122a–170a).

In our opposition to petitioners' motion for relief we also advised the Court that pursuant to the policy set forth in our Supplemental Memorandum in *Schipani* v. *United States,* No. 504, O.T. 1966, p. 8, we had reviewed our files in these cases and our "inquiry has produced no information lending any support whatever to a claim that electronic eavesdropping or wiretapping affected petitioners' convictions."

That review had been conducted pursuant to the policy of the Department of Justice which was set forth in the Memorandum for the United States in Opposition to the Petition for Rehearing From the Denial of the Writ of Certiorari in *Kolod* v. *United*

States, No. 133, O.T. 1967, to disclose the fact that a defendant had been overheard if the overheard conversations were arguably relevant to the prosecution. Since that time, however, this Court has ruled that the government cannot determine for itself whether or not the overhearing of a defendant's conversations may have affected his case. *Kolod* v. *United States,* 390 U.S. 136.

In light of this Court's decision in *Kolod,* we wish to disclose to the Court that, although none of these petitioners was ever the subject of illegal electronic surveillance directed against him, two of the petitioners did participate in conversations which were monitored during the course of electronic surveillances directed against others.

The overheard conversations were unrelated to the prosecution of petitioners and have no bearing on the issues raised in the motion for a new trial presently before the Court. The conversations are in no way related to the allegations which petitioners made in their motion, neither to the allegations which the court found insufficient on their face, nor to the allegations which petitioners declined to attempt to prove. The government has planned to and will make a full disclosure to the district court in accordance with the procedure which this Court prescribes in *Alderman* v. *United States* (the new caption of *Kolod, supra*), pending on the government's motion to modify. If, following the government's disclosure, petitioners believe there is a basis for a further motion for collateral relief, they are not precluded from filing such a motion in the

district court. See *Sanders* v. *United States*, 373 U.S. 1. It is therefore appropriate for the Court to rule on the petition for a writ of certiorari in respect to the particular issues which are presented by this record.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1968.

U.S. GOVERNMENT PRINTING OFFICE: 1968

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 668

JOSEPH STASSI, SR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. B) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on August 29, 1968. Mr. Justice Black extended the time for filing the petition for a writ of certiorari to and including October 21, 1968, and it was filed

on October 19, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court erred in refusing to inspect *in camera* the grand jury testimony of a State Department representative whose testimony consisted primarily of the identification of various official documents.

2. Whether false statements in support of a motion before a Commissioner to reduce bond pending a removal hearing were material.

3. Whether on the facts of this case, the court of appeals could determine from an *in camera* inspection that certain overheard conversations had no bearing on the instant charges.

STATEMENT

Petitioner was convicted by a jury in the United States District Court for the Southern District of Florida of having wilfully testified falsely under oath to material matters in a bail bond hearing before a United States Commissioner, in violation of 18 U.S.C. 1621 (R. I, 12-14; R. III, 1285-1286, 1298).[1] He was sentenced to imprisonment for a period of four years and fined $2000 (R. III, 1310-1311).

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[1] The indictment stated verbatim the alleged false statements which, in substance, constituted an unequivocal denial by petitioner that he had ever applied for, obtained or had anything to do with the issuance of a certain passport issued April 10, 1965 in the name of Michael Frank Dorsi.

Petitioner was arrested on January 25, 1966 under a warrant based on an indictment charging violation of the narcotics laws which had been returned in Houston, Texas in March 1963 (R. I, 67-69, 83, 95, 97-98, 103-106, 180-183, 198). On January 26, 1966, petitioner was brought before the United States Commissioner on his petition to reduce bond (set in Texas at $250,000 in 1963) pending completion of removal proceedings (R. I, 164-165, 180-184, 198). He was represented at the hearing by two local attorneys and an attorney from New York (R. I, 181-182). Under oath petitioner testified that he had never applied for any passport under the name of Dorsi and did not have anything to do with such a passport (R. I, 182, 189-193, 199, 222-225, 252-254). The question of a passport was material to the Commissioner's determination of the advisability of reducing bond as requested by petitioner (R. I, 194). About a week later, petitioner waived a removal hearing under Rule 40, F.R.Cr.P. (R. I, 182).

Petitioner does not challenge the sufficiency of the evidence to show that he in fact applied in person for a passport in the name of Michael Frank Dorsi in the office of the naturalization clerk of Hudson County, New Jersey, on April 7, 1965, attaching his picture to the application which he signed in the presence of the clerk. A passport in that name was issued by the State Department and mailed to Dorsi at the address on the application in West New York, New Jersey.

At the trial, the Chief of the Legal Advisory Branch of the Passport Office in the State Depart-

ment, an attorney who was the operational custodian of processing records, identified and explained entries on documentary evidence (passport application and name index card record) made during the internal passport processing procedure (R. I, 430-431, 438-439). He testified that a passport had been issued on the Dorsi application and mailed, explaining the symbols that had been placed on the application to show the year of issuance, the passport serial number and the date of issuance (R. I, 442-444, 447-448; R. II, 471). He also identified and explained entries on a name index card, a record kept in the ordinary course of the business of processing passport applications, which indicated the name of the applicant, his address, the serial number of the passport and the date and time the passport was placed in the mail bags for mailing (R. I, 445-447). On cross-examination (R. II, 471-495), counsel's questions were predominantly directed at the witness' lack of personal knowledge of the Dorsi passport and the possibility that the passport was inadvertently not mailed even though the index card entry indicated otherwise. When it developed that the witness had testified before the grand jury, counsel sought the grand jury minutes. The government had no objection to an *in camera* inspection but the court could not "see any necessity." (R. II, 96).

ARGUMENT

1. The district court did not commit reversible error in refusing to inspect *in camera*, or turn over to the defense, the grand jury minutes of the State

Department employee who testified about the records relating to the mailing of the passport. The witness' testimony had only minor significance in the case, since it bore only on receipt of the passport while the gist of the case against petitioner was that he falsely denied applying for or having anything to do with the Dorsi passport. Moreover, the witness' testimony related to documents kept in the ordinary course of business—an evidentiary category not meaningfully susceptible to impeachment through grand jury testimony,—and defense counsel never purported to show any need for disclosure (R. II, 496). Nothing in *Dennis* v. *United States*, 384 U.S. 855, dispenses with a showing of particularized need made in order to warrant the disclosure of grand jury testimony. See also *United States* v. *Amabile*, 395 F. 2d 47, 52-53 (C.A. 7), petition for a writ of certiorari pending, No. 129, this Term; *United States* v. *Battaglia*, 394 F. 2d 304, 315 (C.A. 7), petition for a writ of certiorari pending, No. 168, this Term; *United States* v. *Youngblood*, 379 F. 2d 365, 367-368 (C.A. 2). Under *Dennis* the trial judge retains the function of "deciding whether a case has been made for production." *Id.* at 875.[2]

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[2] *Allen* v. *United States*, 390 F. 2d 476 (C.A.D.C.), and *United States* v. *Youngblood*, 379 F. 2d 365 (C.A. 2), do not interpret *Dennis* in a manner conflicting with the decision below. Although the Second Circuit in *Youngblood* exercised its supervisory power to require production of grand jury testimony of witnesses "as of right," the court expressly recognized that *Dennis* had not abandoned the "particularized need" requirement (379 F. 2d at 367-370). Accord, *United States* v. *Amabile*, 395 F. 2d 47, 52-53 (C.A. 7). The Court of Appeals for the District of Columbia in *Allen* also recog-

2. For the first time, petitioner urges in this Court that a United States Commissioner presiding over a removal proceeding under Rule 40 of the Federal Rules of Criminal Procedure does not have power to consider a petition for reduction of bail previously set in the district of indictment. On this basis, he contends that false testimony concerning his application for a passport in 1965 was not material to any issue properly before the Commissioner (Pet. 13-17). Rule 40(b)(2) does, however, clearly give the Commissioner power to fix bail pending the determination of the removal hearing. Thus, irrespective of whether the authority to fix bail for appearance conferred by Rule 40(b)(3) empowers the Commissioner to reduce the bail set in the district of indictment, the Commissioner here could act on petitioner's application for reduction of bond during the pendency of the removal proceedings. Petitioner's false statements under oath in support of his application were thus materially false and made before a competent tribunal.

3. After argument in the court of appeals in the instant case and this Court's decision in *Kolod* v. *United States*, 390 U.S. 136 (motion to amend the order of remand reargued *sub nom. Alderman* v.

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nized that *Dennis* retained the requirement that there be a significant need for the grand jury testimony, although it declined to label it as a "particularized need" (390 F. 2d at 481-482). The decision by the Second and Seventh Circuits under their supervisory power to apply a more liberal rule for production of grand jury testimony than is required by *Dennis* does not create a conflict in circuits as to interpretation of *Dennis*.

United States, No. 133, October Term, 1967), the government filed with the clerk of the court of appeals logs pertaining to electronic surveillance in 1962 of a person identified as "Joe Rogers," an alias known to have been used by petitioner. Following the procedure utilized in *Battaglia* v. *United States*, 394 F. 2d 327 (C.A. 7), petition for a writ of certiorari pending, No. 168, this Term, the court made an *in camera* inspection of the logs and found that the conversations recorded were not relevant to the present case, observing that "without question, * * * the conversations in which 'Joe Rogers' participated and were overheard by Government agents are clearly unrelated to the case now before this Court." (Pet. App. B, p. 38).

The issue before the Court in *Alderman* is whether a court may make an *in camera* determination that overheard conversations are so clearly unrelated to the prosecution at issue that they need not be disclosed to the defense or whether in all instances the material must be turned over to the defense. To that extent we assume the Court will wish to defer action on this petition until decision in *Alderman*.

If the initial determination may be made by a court, there would be no reason for a remand of this case to the district court. The overheard conversations took place at least a year before petitioner became a fugitive from the 1963 indictment for narcotics offenses in Texas and well over two years before he applied for the passport in the name of Michael Frank Dorsi in April 1965. The earliest known date that petitioner used the name Michael F. Dorsi was

June 6, 1964 when he ordered a new automobile in that name in Little Falls, New Jersey (R. I, 369-373, 376-377; Gov't. Exh. 11). The prosecution rested primarily on documents within the government's custody. Since the court of appeals had before it a fully transcribed record of the trial it was fully competent to determine relevancy of the monitored conversations.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 895

JAMES R. HOFFA, ZACHERY A. STRATE, JR., S. GEORGE BURRIS, ABE I. WEINBLATT, AND CALVIN KOVENS, PETITIONERS

v.

UNITED STATES OF AMERICA

No. 911

BENJAMIN DRANOW, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions of the court of appeals on remand (Pet. No. 895 App. 91–104, 104–117) are not yet reported. The opinion of the district court on remand (Pet. No. 895 App. 78–90) is reported at 273 F. Supp. 141. The original opinions of the court of appeals

(Pet. No. 895 App. 1–33, 34–71) are reported at 367 F. 2d 698, 716. The *per curiam* opinion of this Court remanding the case (Pet. No. 895 App. 74–77) is reported at 387 U.S. 231.

JURISDICTION

The judgment of the court of appeals was entered on August 15, 1968 (Pet. No. 895 App. 118). A petition for rehearing was denied on November 7, 1968 (Pet. No. 895 App. 119). On November 26, 1968, the Chief Justice extended the time for filing the petitions for writs of certiorari until January 6, 1968. The petition in No. 895 was filed on January 3 and the petition in No. 911 was filed on January 6, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the government established that its case at trial was not tainted by the overheard Burris-Sigelbaum conversation.

2. Whether the petitioners were prejudiced at trial because they were not given access to certain documents in the government's possession.

3. Whether it was proper for the district court at the eavesdrop hearing to allow the government to rely upon affidavits to show the nonexistence of certain documents.

4. Whether it was proper for the district court to examine *in camera* certain overhearings of defendants which the government had represented to be wholly irrelevant to petitioners' convictions and to deny dis-

closure to the defense of such overhearings when the the court found that they were in fact irrelevant.

5. Whether the district court erred in refusing to order the government to produce any overhearings it might have involving defense counsel and whether petitioners were prejudiced because five overhearings of counsel of record not relevant to this case were disclosed to the court of appeals following oral argument.

6. Whether the district court acted within its discretion in finding petitioner Dranow competent to participate in the eavesdrop hearing.

7. Whether the temporary admission against petitioner Dranow of certain statements made by him deprived the other petitioners of their right to confrontation under *Bruton* v. *United States,* 391 U.S. 123, where this evidence was ultimately excluded as to all petitioners including Dranow (and the jury was so advised) and where Dranow was a witness in his own defense and was thus available for cross-examination by the other petitioners.

STATEMENT

I

INTRODUCTION

In August 1964, following a jury trial in the United States District Court for the Northern District of Illinois, petitioners were found guilty of various counts of a 28-count indictment returned on June 4, 1963, charging wire and mail fraud in violation of 18 U.S.C. 1341 and 1343 in the procurement of loans from the Teamster Union Pension Fund and of conspiracy to commit these substantive offenses

(I D.A. 41–77, 28).[1] They were variously sentenced to fines and terms of imprisonment (I D.A. 31–32, III D.A. 2245–2257; see Government's Brief in Opposition in No. 1003, O.T., 1966, pp. 3–4, n. 3). On October 4, 1966 the court of appeals affirmed as to each petitioner, Judge Swygert dissenting (367 F. 2d 698, 716; Pet. No. 895 App. 1–33, 34–71). Thereafter, upon the government's disclosure in its response to the petition for a writ of certiorari (No. 1003, O.T., 1966) that it had overheard a conversation between defendant George Burris and one Benjamin Sigelbaum on December 2, 1963, in which Burris discussed certain matters relevant to this case,[2]

[1] In order to avoid confusion, our references to the extensive record in the case will be the same form as used by petitioners. Thus, "D.A." designates the three-volume appendix summarizing the trial transcript filed by petitioners on the original appeal; "G.A." is the 1-volume government's appendix in the original appeal; "H.D.A." refers to the three-volume appendix of the eavesdrop hearing held pursuant to the remand. "Tr." refers to the voluminous transcript of the original trial; and "H. Tr." designates the transcript of the eavesdrop hearing.

[2] At the time of the disclosure to this Court the government was proceeding under the policy of reviewing whether there had been prior instances in which an unlawful electronic surveillance had affected a case which had been brought to trial and of notifying the appropriate court whenever it discovered monitoring information which was arguably relevant to the litigation before the court. See the Government's Supplemental Memorandum in *Schipani* v. *United States*, No. 504, O.T., 1966; see also Memorandum for the United States in Opposition in *Kolod* v. *United States*, No. 133, O.T., 1967, pp. 3–5. Cf. *Granello* v. *United States*, 386 U.S. 1019, and the Brief in Opposition for the United States in that case, No. 750, O.T., 1966 at p. 19 n. 12.

This Court did not hold that the government was not authorized *ex parte* to make the determination of relevancy until long after the conclusion of the hearing in this case. *Kolod* v. *United States*, 390 U.S. 136, decided on January 29, 1968

this Court remanded the case to the district court for a hearing to determine whether that or any other electronically overheard conversation had tainted any of the convictions (387 U.S. 231; Pet. No. 895 App. 74–77). Following such a hearing the district court found no taint (273 F. Supp. 141; Pet. No. 895 App. 78–90). The court of appeals affirmed, Judge Swygert dissenting (Pet. No. 895 App. 91–104, 104–117).

II

THE ORIGINAL PROCEEDINGS CULMINATING IN THIS COURT'S ORDER OF REMAND

The evidence adduced at trial to support the charge of mail and wire fraud and conspiracy is fully detailed in the government's brief in opposition filed in response to the first petition for writ of certiorari in the October Term, 1966. We rely on that brief for the detailed presentation of the relevant facts (see government's brief in opposition in No. 1003, O.T., 1966, pp. 5–33, hereinafter "Br."). Here, we shall only summarize the nature of the crime and the purposes and roles of the various petitioners.

The core of the scheme proved at trial was the illegal procurement of money from the Teamster Pension Fund through the filing of fraudulent loan applications. The unlawful conduct of the petitioners was prompted by a need to extricate from financial difficulties Sun Valley, Inc., a Florida real estate corporation in which petitioners Hoffa, Burris and

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(pending on Motion to Amend Order of January 29, 1968, *sub nom. Alderman* v. *United States*, No. 133, O.T., 1967).

Dranow had substantial interests (Br. 6–9). To this end, falsely inflated loan applications were filed with the Pension Fund and money so obtained was diverted to the rescuing of Sun Valley and to the personal profit of the petitioners. The evidence showed that approval for these loans was obtained by exploiting petitioner Hoffa's position of dominance over the Board of Trustees of the Fund (*e.g.*, Br. 14, 16, 17, 18–19, 20, 23, 26). Hoffa was anxious to revitalize Sun Valley because of his own personal interest in that venture and because he had been harmed by the public disclosure of the involvement of Teamster funds in that failing enterprise (Br. 6–7, 8–9, 11–13). Dranow, Burris (and to a lesser extent Kovens) were variously Pension Fund "borrowers" (*e.g.*, First Berkely and Good Samaritan Hospital transactions, Br. 22–28), agents for the procurement of loans (*e.g.*, the Connelly-Everglades transaction, Br. 10–13), and participants in the rehabilitation of Sun Valley (Br. 9, 13, 24–25). In addition to their interest in rescuing Sun Valley, they were also motivated by a desire for personal enrichment (see, *e.g.*, Br. 11, 13, 14–15, 19). Strate and Hyman[3] were primarily borrowers from the Fund (Strate-Pelican transaction Br. 13–17; Hyman-Key West Foundation transaction, Br. 17–22) who, knowing of the overriding goal, joined the scheme with the understanding that to obtain loans for themselves and their projects, they would have to divert funds to Sun Valley (Br. 17, 19). Weinblatt participated as Dranow's alter ego in several transactions

[3] Hyman died some time prior to the eavesdrop hearing (see I H.D.A. 176–177).

(Br. 8–9).[4] As a result of petitioners' fraud on the Pension Fund, Sun Valley was rendered substantial financial assistance in its successful efforts to withdraw from bankruptcy proceedings (Br. 31–32) and petitioners themselves were personally enriched (*e.g.*, Br. 13, 17, 21–22, 23–25, 28).

III

THE HEARING HELD BY THE DISTRICT COURT

A. THE SCOPE OF THE HEARING

Pursuant to this Court's order remanding the case to the district court (*Hoffa* v. *United States*, 387 U.S. 231; Pet. No. 895 App. 74–77), hearings were held in the summer of 1967. Early in the hearing the court (Judge Austin) stated that, in the first instance, it would require the government to establish *prima facie* that the admittedly overheard Burris-Sigelbaum conversation of December 2, 1963, did not "taint" any of the convictions and that there were no other "electronic trespasses" which resulted in the obtaining of any evidence "which aided in the conviction in this case" (II H.D.A. 797, 793). The court deemed this latter category to include any electronically overheard conversations in which any of the defendants participated. Accordingly, it directed the government "to disclose what electronically eavesdropped conversations involving these defendants that there is a record of in the Federal Bureau of Investigation and in the Internal Revenue Department, * * *" (II

[4] Weinblatt's lesser role was recognized by the trial judge who sentenced him to 1 hour in the custody of the United States Marshal and to a fine of $5,000 (ID.A. 32).

H.D.A. 858; see also III H.D.A. 1365, 1430). When the defense objected to the fact that the government was not being directed at that time to disclose overheard conversations of lawyers, the judge responded that such disclosure was not within the ambit of this Court's order (II H.D.A. 857–858; see also III H.D.A. 1069). The court stated, however, that the defense would be permitted to "produce whatever evidence [it] can find in regard to electronic eavesdropping and the other defendants in this case, or the lawyers in this case, in which this trial was discussed, or preparations for this trial was discussed" (II H.D.A. 805–806, 807, 857–858).

B. THE EVIDENCE ADDUCED BY THE GOVERNMENT AT THE HEARING

1. Overheard conversations other than Burris-Sigelbaum

Government counsel represented to the district court that, in addition to the Burris-Sigelbaum conversation of December 2, 1963, it had in its possession nine logs of "certain isolated accidental and absolutely irrelevant overhearings of some of these defendants."[5] (II H.D.A. 849, 852–853; III H.D.A. 1524–1525). The government introduced into evidence an affidavit from Charles Bolz, Chief of the Accounting and Fraud Section of the F.B.I., to the effect that "diligent searches" of F.B.I. records regarding "elec-

[5] Government counsel advised the court that the discovery of such "trivial" items was the result of a "massive search" over a period of almost nine months (II H.D.A. 852).

tronic eavesdropping"[6] of conversations participated in by any of the defendants in this case, disclosed only the Burris-Sigelbaum conversation of December 2, 1963 and the conversations which were contained in sealed Exhibit 1–A (II H.D.A. 850–851, 863–864). This sealed exhibit, containing the logs of the nine conversations, was attached to the Bolz affidavit (II H.D.A. 851–852). The government turned over Exhibit 1–A to the court for an *in camera* inspection (G. Ex. 1–A, II H.D.A. 848–849). Following its inspection of all the logs contained in Exhibit 1–A, the district court concluded that they were "not remotely relevant" to the issues involved in the case and accordingly denied the defense request to examine them. The court further ordered that the logs be resealed and made available to the court of appeals on appeal (II H.D.A. 864–865).

An affidavit sworn to by Leon Green, Deputy Assistant Commissioner for Compliance of the Internal Revenue Service, was also read into the record. This affidavit stated that diligent searches of the files and records of the Internal Revenue Service had failed to disclose any electronic overhearings of the defendants (II H.D.A. 854–855). The court denied the defense request to strike the Bolz and Green affidavits (II

[6] Government counsel pointed out that the term "electronic eavesdropping" was meant to include not "only bugging or the placing of an electronic device by trespass" but also "wiretapping" (II H.D.A. 865).

H.D.A. 855, 862–863), pointing out that no restrictions would be placed upon the defense calling these affiants as witnesses or otherwise endeavoring to establish the falsity of their affidavits (II H.D.A. 860–861). The defense never sought to call either Bolz or Green as witnesses.[7]

2. The Burris-Sigelbaum conversation

The government introduced into evidence all records it had of the December 2, 1963, conversation between petitioner Burris and Benjamin Sigelbaum—*i.e.*, a certified copy of the F.B.I. log of that intercepted conversation (G. Ex. 1, I H.D.A. 233–249; see II H.D.A. 820–823), and two memoranda summarizing the log—one dated December 26, 1963 (G. Ex. 3–1, I H.D.A. 253–257) and the other dated January 11, 1964 (G. Ex. 2–3, I H.D.A. 250–252).

a. The substance of the conversation as it appears in the log is as follows: Burris mentioned certain tax problems he had and requested that Sigelbaum buy out "some of his deals" (I H.D.A. 234). There then followed a short discussion of the political situation in Washington, D.C. (I H.D.A. 234). Burris returned to his personal financial problems, and mentioned the possibility of transferring a 10% interest in Sun Valley to Sigelbaum (I H.D.A. 234–235). The latter responded that he had a prior claim against that interest but had not pressed it because of his concern

[7] Joseph Harmon who, in 1963, was assistant Chief of the Intelligence Division of the Internal Revenue Service was called as a defense witness at the hearing and testified that to his knowledge there was no electronic eavesdropping or wiretapping of any conversations of the defendants in the instant case, from 1961 through 1964 (III H.D.A. 1421, 1425, 1436).

about getting Dranow into trouble since everyone wanted Dranow and Hoffa to get "straightened out" (I H.D.A. 235–236, see also I H.D.A. 239–240). Sigelbaum also spoke of an unnamed bank's claim against Sun Valley, and allowing it to precede his (I H.D.A. 235–236; see also I H.D.A. 242). Burris advised Sigelbaum that he had paid for his 10% Sun Valley interest by borrowing $57,000 from one Kipnis, which amount he later repaid from a fee he received from Kipnis. He said that they "were supposed to get another ninety thousand dollars" (I H.D.A. 236–237). Sigelbaum mentioned that he had tried to get Burris more money, which the latter would not accept (I H.D.A. 237). Sigelbaum referred again to his own and others' claims against Sun Valley and noted that "Willis" was the trustee of these claims (I H.D.A. 237–239). Sigelbaum referred to his "bail-out" of Dranow and Sun Valley, pointing out that others who knew nothing of this just sat back and made their profit (I H.D.A. 240–241). Burris said that he had given the bank $5,500 out of his personal account (I H.D.A. 243). When Sigelbaum inquired about the nature of the charges against Burris and how far he was involved, Burris replied that the government's case was not a good one but that the jury might conclude that where "there is smoke there must be some fire" (I H.D.A. 243–244). He said that the case had nothing to do with income tax and that his fee from the "Airport" was in the form of a check and he had reported it (I H.D.A. 244–245). Burris further stated that the government could not prove any fraud or conspiracy involving the Pension Fund because of the

strict manner in which the Fund was run (I H.D.A. 245–246). Sigelbaum then referred to "Bill Manheight" who, he said, was an attorney who had been interviewed by the FBI concerning his Pension Fund loan application and, who, Sigelbaum believed, would make an excellent defense witness (I H.D.A. 246–247, 248). Sigelbaum inquired about defendant Hyman and his Key West Foundation transaction. Burris responded that Hyman had used Pension Fund loans "a little bit differently" than he was supposed to but that he had ultimately spent the money on the property for which the loans had been obtained (I H.D.A. 248).

b. The government also introduced evidence as to the preparation and distribution of the log. It showed that a listening device had been installed by trespass in the Sigelbaum office in January, 1963 (III H.D.A. 1335–1339). The Burris-Sigelbaum conversation was monitored by F.B.I. Agent Fleck on December 2, 1963 (III H.D.A. 1168–1169). In accordance with normal practice, at the start of the conversation, Fleck activated a tape recorder and took hand-written notes. From the notes and tapes, he prepared a log which he turned over to his relief agent who, in turn, passed it on to Agent Swinney, his supervisor (III H.D.A. 1131–1133, 1168–1169, 1208–1209).[8] Swinney wrote the name of F.B.I. agent Connors on the first page of the log so that agent would see it since

[8] In accordance with usual practice the notes were destroyed and tapes erased after the log was prepared (III H.D.A. 1151–1152, 1171–1172, 1193–1199, 1203, 1250, 1336, 1345, 1348).

Swinney knew that Connors had "an investigation going concerning Sun Valley" (III H.D.A. 1342, 1356–1357; see also III H.D.A. 1269, 1384). Swinney did not discuss the contents of the log with Connors (III H.D.A. 1356–1357) and knew nothing of the substance of the Sun Valley investigation (III H.D.A. 1384–1385). Swinney also wrote on the log the name "Doerner" the F.B.I. agent in charge of the Sigelbaum investigation (III H.D.A. 1342, 1243–1244).

Agent Connors testified that he had seen the log, but not the notes nor the tapes from which the log was prepared (III H.D.A. 1046). Connors routed the log to agent Doerner, the next name on the list, and advised Doerner that the "George" mentioned in the log was George Burris (III H.D.A. 1045–1047, 1247–1248).[9] Doerner did not send the log on or discuss it with anyone but Connors (III H.D.A. 1248–1249, 1258).

Connors prepared two summary memoranda of the log, on December 26, 1963, and January 11, 1964,[10] and forwarded them to F.B.I. headquarters in Chicago and Washington, D.C. (III H.D.A. 1032–1033, 1051–1052). Connors did not forward either report to

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[9] The monitoring agent (Edward Fleck) had thought "George" was possibly George Simon (III H.D.A. 1176–1177).

[10] Connors testified that the second memorandum differed from the first in that it contained "administrative corrections"—*i.e.* it was written "in more general terminology, leaving out some of the direct quotations and excessive wording" (III H.D.A. 1058). The two memoranda are set out at I H.D.A. 251–252, 253–257.

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government counsel and never discussed their contents with government attorneys or special investigator Walter Sheridan (III H.D.A. 1054–1056). Connors further testified that he had examined the files in the Miami office of the F.B.I. relating to this case for the period December 1, 1963 to the date of the hearing and that such examination revealed that no one had requested or conducted an investigation based on the log or the two memoranda he prepared therefrom (III H.D.A. 1160–1162; H. Tr. 1320). The January 11 memorandum was sent to the attention of Walter J. Sheridan, a special investigator of the Criminal Division of the Department of Justice (G. Ex. 2–3, I H.D.A. 250, III H.D.A. 1272–1273, 1276–1277).

Government trial attorney, William Ryan, testified that since his initials appeared on the routing slip attached to the January 11 memorandum, he apparently had seen a copy, although he had no independent recollection (III H.D.A. 1113–1115, 1117).[11] He had no recollection of discussing it with any other attorney involved in the prosecution of the case until sometime in 1967, long after the prosecution had been concluded (III H.D.A. 1118). He did not see the actual log of the conversation before 1967 (III H.D.A. 1109–1110). Ryan testified that his review of Department of Justice files for the period December 1, 1963 until the end of July 1964 (the verdict in the trial of this case was returned on July 26, 1964, I D.A. 28) showed that he never requested nor conducted an investigation based on the

[11] The December 1963 memorandum was not seen by government attorneys until after the trial (III H.D.A. 1059).

January 11, 1964 memorandum. To the best of his knowledge no one else requested such an investigation (III H.D.A. 1125–1126).[12]

c. The government also established in detail that it had independent sources for all the relevant facts mentioned during the overheard conversation.[13]

(1) The Burris, Dranow, and Hoffa interests in Sun Valley

The evidence as to Hoffa's financial interest in Sun Valley beginning in 1955 or earlier, his deposit of Teamster Union Funds in a "restricted" account in a Florida bank to secure $400,000 in loans made to Sun Valley by that bank, Sun Valley's financial difficulties, and the creation of Union Land & Home Company by Dranow and Burris to purchase a Sun Valley stock option from Hoffa and to rehabilitate Sun Valley, is fully detailed

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[12] Other government trial counsel—*i.e.*, Messrs. Poretz, Smith, Canavan, and McTiernan—had also been sent the January 11, 1964 memorandum shortly after its preparation and certain of them had written comments thereon (I H.D.A. 250–252, 126–127). The government sought to introduce the affidavits of every government attorney who came into contact with the January 11, 1964 memorandum to the effect that the information contained therein never provided any leads and that no governmental investigation was conducted based on it (III H.D.A. 1226–1227). The court sustained the defense objection to the admission of such affidavits (III H.D.A. 1242–1243).

[13] Most of this independent source material consisted of interviews conducted by government agents predating the Burris-Sigelbaum conversation. The agents who had conducted these interviews (including several with Burris and with Sigelbaum) testified that the documents the government introduced at the hearing to show independent source were the accurate reports they had prepared of such interviews (II H.D.A. 869–870, 884–886, 921–922, 932–934, 943–947, 965–972; III H.D.A. 1004–1007; see also II H.D.A. 882–884, 928–931).

in our original brief in opposition (Br. 6–9). Extensive information relating to these matters was in the government's possession long before the December 1963 conversation. This information derived, among other sources, from Burris' sworn testimony before a Senate (McClellan) Committee on June 29, 1959 and before a grand jury in October 1959 (See G.A. 74–82, 92–103); Hoffa's statement under oath on September 17, 1958 (G.A. 83–91); an F.B.I. interview with Burris on February 17, 1960 (G. Ex. 17A I H.D.A. 310–315) and on October 2, 1962 (G. Ex. 19A, I H.D.A. 321–324).

(2) Sigelbaum's interest in Sun Valley

In an interview with the F.B.I. on November 8, 1960 Sigelbaum described in some detail his membership in a group which, after conferences with Dranow, had invested $250,000 for a 50% interest in Sun Valley stock and stated that his own investment amounted to over $66,000 (G. Ex. 4A, I H.D.A. 257–262; III H.D.A. 1228–1229). Similar information was contained in the statement of Edwin Willis (one of Sigelbaum's associates in the Sun Valley venture) to the F.B.I. on December 22, 1960 (G. Ex. 9A, I H.D.A. 279–282, III H.D.A. 1229).[14] Also introduced at the hearing was the November 15, 1960 statement of Julius Friedman, the attorney representing the Sigelbaum interests in this venture, which referred to that group's further investment in Sun Valley (G. Ex. 5A, I H.D.A. 262–270, 267).

[14] Willis' statement of December 22, 1960 (G. Ex. 9A, I H.D.A. 279–282, 280) further directly provided the information contained in the log that Willis was to be the "trustee".

(3) A bank's claim against the Dranow-Burris interest in Sun Valley

Information relating to this matter was contained in detailed testimony before a federal grand jury on October 9, 1962 from Lou Poller, an officer of the Miami National Bank, which had numerous dealings with the Teamster Pension Fund. According to Poller's testimony, Dranow had an account at the Miami bank which became overdrawn by more than $50,000 and Poller covered this from his own account. Poller thereafter threatened to overturn the sale of Sun Valley stock unless he or the bank received 10% from the Dranow-Burris interests in that stock (See G. Ex, 25A, I H.D.A. 437–440; III H.D.A. 1229–1232). See also, Poller's F.B.I. interview of July 25, 1962 (G. Ex. 14A, I H.D.A. 299–300).

(4) The $57,000 transaction between Burris and Kipnis

The government's information relating to this transaction[15] came from several sources pre-dating the Burris-Sigelbaum conversation of December 1963. This transaction was referred to by Kipnis in F.B.I. interviews on July 2, 1962, July 31, 1962 and October 31, 1963 (G. Exs. 6A–8A, I H.D.A. 270–279; III

[15] The trial evidence revealed that, in 1960, Irving Kipnis had agreed to pay Burris a fee to obtain a Pension Fund loan to build the Causeway Inn. At about the same time, Kipnis gave Burris $57,000 for an option to buy 10% of Sun Valley with the further agreement that the option would become a loan if Kipnis decided not to exercise it. The option ultimately became a loan to Burris which was used to rehabilitate Sun Valley. Burris repaid it in 1962 out of fees he had received in procuring the Causeway Inn loan for Kipnis (II D.A. 1386, 1389–1391).

H.D.A. 1004–1007). In addition, Kipnis discussed this transaction in an affidavit given to the Internal Revenue Service on May 31, 1963 (G. Ex. 11, I H.D.A. 284–290; see III H.D.A. 1103–1105), and in an interview with the F.B.I. and I.R.S. on August 6, 1962 (G. Ex. 12A, I H.D.A. 290–294, 291).[16]

(5) Sigelbaum's use of the term "bail-out"

The government showed that the use of the phrase "bail-out" to describe the attempt to take Sun Valley out of reorganization long preceded the Burris-Sigelbaum conversation of December 1963. At trial, Carl Langford, the trustee of SunValley during reorganization, had testified that in 1960 defendant Hyman had asked him what it would take to "bail the corporation out of its difficulties" (II D.A. 1399–1400).

(6) Burris received a fee from the airport

This apparently refers to transactions involving the procurement of loans to construct a hotel at the Miami Airport. Between 1959 and 1961 George Simon, a Miami accountant, secured Teamster Pension Fund loans for such construction with the assistance of Burris. Simon paid Burris a finder's "fee" for his services in procuring the loans (II D.A. 1174, 1179–1185). Detailed information relating to this transaction came from Simon's statements to the F.B.I. on February 2, 1961, and February 14, 1961 (G. Exs. 15A–16A, I H.D.A. 301–310); see also, the February 15, 1961, statement of one Jack B. Cooper, a stockholder in

[16] Kipnis also recounted the details of this transaction in testimony before a federal grand jury sitting in Chicago, on September 18, 1962 (G. Ex. 22A, see I H.D.A. 373).

Airway Hotel Inc., stating his awareness that "finders's fees" had been paid to Burris (G. Ex. 10A, I H.D.A. 283–284).

(7) The procedures of the Pension Fund

The safeguarding procedures said to have been employed by the Teamster Pension Fund in processing loan applications were described before a federal grand jury on February 8, 1962, by Morris Lieberman, Appraiser for the Pension Fund (G. Ex. 20A, I H.D.A. 324–349), and on October 17, 1962, by Stanford Clinton, General Counsel for the Pension Fund (G. Ex. 26A, I H.D.A. 441–448).

(8) Hyman's expenditures of Key West Foundation loan proceeds

As developed at the trial, defendant Hyman had obtained Pension Fund proceeds in 1959 and 1960 for Key West Foundation for the avowed purpose of building a shopping center and for remodeling an apartment development and had used such proceeds during the period in question for purposes other than those represented to the Pension Fund (See Br. 19–22). At interviews with F.B.I. agent Godwin on June 20 and July 7, 1961, Hyman advised that he had used $100,000 of Pension Fund proceeds loaned to Key West Foundation to purchase a one-half interest in Sun Valley (II D.A. 900, see also II D.A. 892–897). There was also the testimony of Cecil Black (who did carpentry and masonry work for Hyman), who testified before a grand jury on August 27, 1962 (G. Ex. 27A, I H.D.A. 449–460) and at trial (II D.A. 919–930, erroneously titled in the Appendix, *"Testimony of Burton Harrison"*) that he had signed waivers

for receipt of loan funds for construction payments from Hyman (some $656,000), when, in fact, he had not actually been paid such funds (see G.A. 138–145). There was also testimony at trial that payment had not been made to another creditor, contrary to what Hyman had represented to the Fund (see II D.A. 908, 935–936, 938–939). This testimony and supporting documentary evidence thus showed that from May to November 1960 Hyman obtained the full amount of the second Pension Fund loan ($400,000) by misrepresenting to the Fund that construction expenses amounting to $706,000 had in fact been incurred (see G.A. 134–145, 323–324, 344–345).

At the hearing, agent Connors testified that he had examined the books of Key West Foundation in 1962 and at the end of September 1963, at the request of government counsel then involved in preparation for the trial, and had used these records to prepare schedules relating to the disposition of Pension Fund loans by Key West Foundation (III H.D.A. 1007–1008, 1081).[17] Based upon his examination of the books of Key West, ledger sheets, checks and other exhibits in evidence (III D.A. 1681–1682), he had testified at trial that during this period of allegedly heavy construction expenses by Key West Foundation (November 1959 through December 1960), with Hyman making periodic "construction draws" on the Pension Fund loans assertedly to pay creditors (see, *e.g.*, G.A. 138–142), no payment to creditors in the amount al-

[17] Government Exhibits 21A and 24A reveal that the books and records of Key West Foundation had been turned over to the government in September and October 1962 (I H.D.A. 350–352, 432–436).

leged appeared in the books and records of Key West Foundation (III D.A. 1683, 1686, 1687, 1693, 1701, 1709, 1740; see II H.D.A. 585–586).

Agent Connors testified that certain of his accounting schedules (those dealing with Key West Foundation books for the latter part of 1962) were prepared in 1964 (III H.D.A. 1027, 1038). This was after he had seen the log of the Burris-Sigelbaum conversation of December 2, 1963 and had prepared the two memoranda of that log (III H.D.A. 1027). He also testified that the accounting "summaries" he had actually used at trial were prepared a few weeks before his trial testimony at the direction of the government prosecutors, and were basically "a recap of the older summaries" (III H.D.A. 1028–1030, 1011).[18] He stated that the December 1963 conversation "meant nothing to" him and he "did not consider that conversation" in preparing his accounting documents (III H.D.A. 1027–1028); that the Key West books and records showed that by the end of December 1960, all Pension Fund loans received up to that time had been spent (III H.D.A. 1041); that when he prepared his accounting summaries, he did not know that it would be

[18] During cross-examination at trial, Connors had testified that some of the accounting worksheets he had earlier prepared were destroyed—some at the end of 1962 and others about seven weeks before trial—because he had been advised by the government prosecutors that they were not to be used. He further stated that "some" of these destroyed worksheets dealt with a period beyond December 31, 1960—*i.e.*, the cut-off date of the summaries used at trial (See III D.A. 1726–1728; II H.D.A. 593–594, 597). He further explained that his trial summary "of the whole picture" superseded these earlier worksheets (III D.A. 1727, 1731–1732).

the defense's contention at trial that Hyman had ultimately spent all the Key West Pension Fund loan proceeds in a proper fashion (III H.D.A. 1078–1079); and that he never directed that the memoranda he prepared from the log be sent to government trial counsel, nor discussed the log of the Burris-Sigelbaum conversation or either of the two memoranda based thereon with any government trial counsel (III H.D.A. 1030, 1033, 1034–1035, 1057, 1086–1087).

(9) Reference to potential witness Bill Manheight

William Ryan, one of the Department of Justice attorneys involved in the prosecution of this case, testified that he had never heard of nor interviewed any "Bill Manheight" and that "Manheight" was not called as a witness to testify at trial (III H.D.A. 1120). Agent Connors testified that he had never heard of "Manheight" nor seen any report concerning an investigation of "Manheight" (III H.D.A. 1052).[19]

C. THE FINDINGS OF THE COURTS BELOW

1. After summarizing the evidence adduced at the hearing, including that presented by the defense (see Pet. No. 895 App. 78–89), the district court concluded "that the government obtained no new information from the electronically eavesdropped overhearings in

[19] "Philip Monheit" testified as a defense witness at the hearing that he had in the past applied for a Teamster Pension Fund loan, but had never gone through "with the deal" and that in February 1963 he had been interviewed by an F.B.I. agent (I H.D.A. 224–226; III H.D.A. 1330–1335). Monheit never testified at trial nor was his name mentioned in connection with any evidence adduced at trial (H. Tr. 1723).

the record and that none of the overhearings had any relevance to the convictions of any of the defendants." Accordingly, it found "that the convictions of none of the defendants were tainted by the use of evidence improperly obtained" (*United States* v. *Hoffa,* 273 F. Supp. 141, 147 (N.D. Ill); Pet. No. 895 App. 89–90). With particular reference to the nine overhearings submitted for *in camera* inspection (G. Ex. 1A), the district court stated that it had carefully read the "extremely brief overhearings" and that they "contain no information either remotely or peripherally relevant to the transactions and evidence on which these defendants were indicted and convicted" (273 F. Supp. 141, 143; Pet. No. 895 App. 79–80). The district court thereupon denied the motions for a new trial, entered new final judgments of conviction against each of the defendants and reimposed the sentences originally imposed (I H.D.A. 155–164).[20]

2. The court of appeals affirmed, Judge Swygert dissenting. The majority agreed with the district court that none of the convictions was based on tainted evidence; that the nine overhearings of defendants which had been submitted for *in camera* inspection to the district court were not "remotely" relevant; and that the other questions raised on appeal were without substance (Pet. No. 895 App. 91–104). In response to inquiry during oral argument of the appeal government counsel disclosed to the court of appeals that certain lawyers of record for the defendants in the original

[20] Except as to defendant Hyman who had died sometime prior to the hearing (See I H.D.A. 176–177).

Pension Fund trial had been electronically overheard talking to persons other than defendants about matters not related to this case and submitted the logs of these overhearings to the court for *in camera* inspection. Based upon its *in camera* examination of these logs the court concluded that "the information is completely irrelevant to the Hoffa case before this Court" (Pet. No. 895 App. 98).[21]

ARGUMENT

Petitioners' contentions fall into two broad categories: It is first urged that this Court should grant plenary review to remedy alleged errors resulting from the eavesdrop hearing held pursuant to this Court's order of remand (Pet. No. 895, pp. 55–77; Pet. No. 911). It is next asserted that errors flowing from the original conviction in 1964 justify issuance of the writ (Pet. No. 895, pp. 76–106). Since the alleged errors flowing from the conviction were raised in the original petition (No. 1003, O.T. 1966) and are fully answered in our original brief in opposition, we do not repeat those responses here but rely upon that brief.[22] However, since one of the earlier contentions has been recast to rely on *Bruton* v. *United States*, 391 U.S. 123, we shall answer that contention in this brief.

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[21] Both the sealed defendant overhearings and the overhearings of attorneys are on file with the Clerk of this Court.

[22] We are filing herewith 10 additional copies of our original brief in opposition which we have asked the Clerk to distribute to the Court.

I

ISSUES ARISING FROM THE EAVESDROP HEARING

A. THE BURRIS-SIGELBAUM OVERHEARING

The facts detailed in the Statement show that the government's evidence at trial stemmed from sources wholly independent of the Burris-Sigelbaum conversation and that the conversation did not provide investigative leads and was not used in any fashion at trial.[23] The government's case was predicated upon years of extensive, independent investigation predating the unplanned overhearing of Burris on December

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[23] For the first time in this Court petitioners urge (Pet. No. 895, pp. 66–67) that the "beyond a reasonable doubt" standard of *Chapman* v. *California*, 386 U.S. 18, should be applied to determine whether the government has established lack of taint in the Burris-Sigelbaum conversation. This standard was not, however, urged in the district court or in the court of appeals. There the government agreed with the view expressed by petitioners in their brief that the "clear and convincing evidence" test announced in *United States* v. *Wade*, 388 U.S. 218, 240, was the appropriate standard (see petitioners' brief in the court of appeals, p. 57; cf. the government's brief in the court of appeals, p. 38). Petitioners have not shown any "exceptional circumstances" which would allow them to make this contention for the first time in this Court. See *Lawn* v. *United States*, 355 U.S. 339, 362–363, n. 16. Nor do the court of appeals cases which petitioners cite (Pet. 67) point to the adoption of the *Chapman* standard in the present context. They hold only that if illegally seized evidence is introduced at trial, the government must meet the *Chapman* test in order to show lack of prejudicial error.

In any event, our position is that whatever standard is applied, the government met its burden of establishing lack of taint arising out of the Burris-Sigelbaum conversation.

2, 1963.[24] Indeed, the detailed indictment in this case—which was returned some six months before the Burris-Sigelbaum conversation took place—dealt with all the loan transactions proved at trial (1 D.A. 41–77). As the majority below noted, "[i]t is apparent the charges made against the defendants in the indictment were drawn in such detail and particularity that they could have come only from a full investigation of all the facts underlying the scheme. It is neither conceivable nor realistic to believe that this information could have been obtained from a cryptic half hour conversation which occurred six months after the indictment had been returned" (Pet. No. 895, App. F 97).[25]

1. *a.* Petitioners contend that the government obtained a theory of the defense because of overhearing Sigelbaum comment to Burris that "Bill Manheight" would make a good defense witness to show how difficult it was to get a Pension Fund loan (Pet. No. 895, p. 57). The government, however, did not know who this "potential" witness was until it learned at the eavesdrop hearing that "Bill Manheight" was actually "Philly Monheit" one of the numerous loan

[24] As the evidence adduced at the hearing made quite plain, the overhearing occurred as a result of the government's surveillance of Benjamin Sigelbaum and "his connection with organized crime" and was not the result of any investigation conducted as to any defendant (See III H.D.A. 1253, 1337, 1349, 1352).

[25] The trial lasted about 13 weeks and involved the testimony of approximately 140 witnesses and the introduction of several thousand exhibits. The trial transcript exceeds 16,500 pages.

applicants who had been interviewed by the government before trial but whose testimony was never adduced at trial (III H.D.A. 1119–1120, 1052, 1330–1333). Moreover, the government was fully aware of the Pension Fund's loan screening procedures from wholly independent sources (see *supra,* p. 19; G. Ex. 20A, I H.D.A. 325, 330–349; G. Ex. 26A, I H.D.A. 441, 443–448). Nor does the fact that one of the government trial counsel wrote "such testimony would not be admissible" next to the January 1964 memorandum's reference to "Manheight" (see G. Ex. 2–3, I H.D.A. 126, 252) support the argument that this individual or his information was ever used by government counsel; the notation reflects only government counsel's normal reaction to information which he believed was clearly not relevant to the case.

b. Petitioners' major argument on this aspect of the case (Pet. No. 895, pp. 57–59) stems from the fact that F.B.I. agent Connors, who had prepared the January 1964 memorandum which had been circulated to the government prosecutors, was also a government witness at trial testifying as an accounting expert concerning the expenditures of Hyman's Key West Foundation. Relying on the fact that Connors reported in the memorandum that Burris told Sigelbaum that, while Hyman had used Pension Fund Proceeds "a little differently" at first, he had "ultimately put it into the property" (See I H.D.A. 252), and that government counsel had written the notation "does this check out" on this portion of the memorandum (see I H.D.A. 126), petitioners argue

that Connors, at the behest of the prosecutors, must have tailored his testimony at trial to avoid mentioning Key West's expenditures in 1961, in an effort to anticipate and thwart the defense theory (allegedly learned from the memorandum) that in this later period Hyman had properly expended the Pension Fund loan proceeds.

The Key West Foundation loans from the Pension Fund were obtained in the fall of 1959 and the spring of 1960 (Br. 19–22). It was a condition of the $400,000 loan in 1960 that Hyman would have to expend one dollar for every two dollars loaned by the Fund and that detailed, written proof of expenditures had to be submitted to secure construction "draws." The evidence showed that Hyman withdrew the full $400,000 in 1960 on the basis of documents purporting to show the expenditure of $706,000. The government showed that this documentation was false. In particular it showed, payments of $656,000 allegedly made to Black Construction Company, were not made and that Black was a salaried employee of Hyman who never received more than $125.00 per week for himself. In addition Connors testified that the books of Key West showed expenditures of $186,000, not $706,000, during 1960.

Since the money was paid out by the Fund for money allegedly spent by Hyman in 1960, the government properly proved its case by showing that the alleged expenditures had not in fact been made in 1960. The claim that Hyman did actually spend the money

on remodeling in 1961 [26] was at best a defense in mitigation not going to prove the absence of falsity in the earlier representations made to the Pension Fund. There is thus no reason to read sinister implications into the fact that government counsel told Connors that it was confining his accounting evidence to 1960.[27] Connors testified at the hearing that at the time he prepared his accounting summaries he did not know "it was Hyman's position that he had spent all of the money from the loan on his property" (III H.D.A. 1040), nor did he learn of that fact from any of the defendants "directly or indirectly" (III H.D.A. 1078–1079). He further testified that he had not discussed the log or the memorandum he prepared therefrom with the government prosecutors (see III H.D.A. 1030, 1033, 1034–1035, 1054–1057, 1086–1087) and unequivocally stated that the December 1963 Burris-Sigelbaum conversation "meant nothing to" him in preparing his accounting documents (III H.D.A. 1027–1028).

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[26] Richard Furman, an accountant whose firm audited the books of Key West Foundation, testified, as a defense witness, that Key West's book showed expenditures for construction and improvement in 1961 but his testimony did not show that these expenditures were the ones that Hyman had represented to the Pension Fund were made in 1960 (III D.A. 1776–1781).

[27] Connors testified in cross-examination at trial that he had limited his accounting summary to December 31, 1960 because of a decision by government counsel to that effect shortly before trial and that he had destroyed his earlier prepared accounting papers—some of which related to the post 1960 period—because he had been told by government prosecutors that they were not going to be used (see III D.A. 1701, 1727, 1731–1732).

2. As a variant of the foregoing argument, petitioners urge that the failure of the government to produce for inspection at trial the two memoranda of the log prepared by agent Connors or a memorandum he had prepared in October 1963, violated their rights under 18 U.S.C. 3500 (Pet. No. 895, pp. 59–63).

a. The memoranda which Connors prepared from the log of the Burris-Sigelbaum conversation did not relate to the direct testimony of Connors at trial. The agent testified at trial solely as an expert accountant with regard to the books and records of Key West Foundation. Indeed, one of defense counsel at trial objected to Connors' testimony on the ground that the records of Key West Foundation spoke for themselves (III D.A. 1689). In short, Connors' sole function and the entire tenor of his testimony was to provide the jury with an expert's analysis of these documents. Cf. *United States* v. *Donlon,* 256 F. Supp. 336, 341–342 (D. Del.), affirmed, 370 F. 2d 987 (C.A. 3), vacated and remanded for other reasons (No. 121, O.T. 1967), in *Stone* v. *United States,* 390 U.S. 204. The basic purpose of 18 U.S.C. 3500 is to provide for production of documents which have some conceivable relevance to the witness' cross-examination. See, *e.g., Palermo* v. *United States,* 360 U.S. 343, 349–351; *Rosenberg* v. *United States,* 360 U.S. 367, 370; *Ogden* v. *United States,* 303 F. 2d 724, 740 (C.A. 9); *Oertle* v. *United States,* 370 F. 2d 719, 724–725 (C.A. 10), certiorari denied, 387 U.S. 943; *United States* v. *Heap,* 345 F. 2d 170, 171 (C.A. 2).

Here the memoranda did not bear any relevance to Connors' testimony.[28]

In any event, the superficial hearsay comment by Burris added nothing to what the defense already knew of Hyman's expenditures for Key West Foundation. The defense introduced its own expert analysis concerning the 1961 expenditures during their direct case at trial (see III D.A. 1774–1783). Although the factual setting may be different, the reasoning of *Rosenberg* v. *United States,* 360 U.S. 367, 371 applies here: "Since the same information that would have been afforded had the document been given to defendant was already in the possession of the defense * * * it would deny reason to entertain the belief that defendant could have been prejudiced by not having had opportunity to inspect the [document]." See, similarly, *Killian* v. *United States,* 368 U.S. 231, 243–244.[29]

b. Petitioners also claim that the government improperly failed to produce at trial a memorandum prepared by Connors on October 8, 1963 relating to

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[28] When, at trial, Connors testified on cross-examination that he rendered no report concerning his work, the inquiry and his answer were obviously directed to accounting work concerning the matters about which he had testified (III D.A. 1726–1727, see also III H.D.A. 1062).

[29] We see no valid basis for distinguishing *Rosenberg* or *Killian* because the information in those cases came into the possession of the defense in a way different from this case—*i.e.*, in *Rosenberg* by way of the witness' testimony at trial and in *Killian*, by way of other statements turned over to the defense. Whatever the source, the defense had full and independent access to information which it is said was denied it by the government.

conversations with government trial counsel concerning his preparation of accounting summaries (See D. Ex. H-7, I H.D.A. 221–224). It is not clear, however, that this document was a "statement" within the purview of 18 U.S.C. 3500. It contained neither recommendations nor conclusions, but was simply a general outline concerning the format that Connors proposed to follow in preparing his accounting papers (See I H.D.A. 221–224). When, at the hearing, defense counsel asked Connors why he had said at trial that he had made no report of his accounting work when in fact he had prepared this report of October 8, 1963, government counsel pointed out that this document was not a report of his accounting work but rather "a report on a conversation in which work was asked to be performed" (III H.D.A. 1062).

But even if this October 1963 memorandum was a "statement" of the witness relating to his direct testimony at trial within the reach of 18 U.S.C. 3500, it had marginal—if any—impeaching value. The document's single reference to 1961 was contained in the heading of an "example" of the type of accounting schedules the agent was preparing, with no reference to any money spent by Hyman during that period of time (I H.D.A. 221–222). Moreover, as we have already stressed, the manner in which Hyman spent funds in 1961 was immaterial to the government's case. By independent evidence the government had established that Hyman had in 1960 misrepresented the extent of construction expenditures to the Pension Fund. Agent Connors simply corroborated this evidence by testifying that Key West's books and records for 1960 showed that no such

expenses had, in fact, been incurred (See Br. 17–22).[30]

c. The foregoing discussion fully disposes of petitioner's related claim (Pet. No. 895, pp. 63–65) that the principles of *Brady* v. *Maryland,* 373 U.S. 83, require reversal for failure to disclose these documents at trial. In view of their extremely limited value the failure to disclose these documents for impeachment purposes hardly can be categorized as a due process violation.

B. OTHER ISSUES ARISING FROM THE EAVESDROP HEARING

1. Petitioners assert that the introduction by the government of the affidavits of Charles Bolz, Section Chief of the Accounting and Fraud Section of the Federal Bureau of Investigation and of Leon Green, Deputy Assistant Commissioner of the Internal Revenue Service, to carry its burden of showing that neither the F.B.I. nor the Internal Revenue Service had any overhearings of defendants except those turned over to the defense or the district court for *in camera* inspection[31] denied them the right of confrontation guaranteed by the Sixth Amendment (Pet. No. 895, pp. 72–75). Rule 27 of the Federal Rules of Criminal Procedure, and Rule 44 of the Federal Rules of Civil Procedure, how-

[30] It should also be noted that the Key West Foundation transaction itself was only a one of nine multi-faceted Pension Fund transactions proved at the trial establishing a far-flung scheme to defraud the Pension Fund.

[31] These affidavits, in essence, stated that both the F.B.I. and the Internal Revenue Service had caused searches to be made of their files to determine if there were any other overhearings of the defendants not turned over to the defense or to the court and that the searches revealed no such additional overhearings (See I H.D.A. 118–119, II H.D.A. 851–852, 854–855).

ever, embody the reasonable principle that there is no occasion to burden government officials with the duty of personal appearance with respect to official records. Lack of a record may be proved by a certified statement of an official that, after diligent search, no such records exist. The sworn affidavits of Bolz and Green satisfied these requirements. See *T'Kach* v. *United States,* 242 F. 2d 937, 938 (C.A. 5); *United States* v. *Ansani,* 138 F. Supp. 454, 461 (N.D. Ill.), affirmed, 240 F. 2d 216 (C.A. 7), certiorari denied *sub nom. Milner* v. *United States,* 353 U.S. 936; *Smith* v. *United States,* 353 F. 2d 838, 844 (C.A.D.C.), certiorari denied *sub nom. Cunningham* v. *United States,* 384 U.S. 910.[32]

In recognition of these controlling precedents, petitioners argue that there is "an apparent" conflict between Rule 27 of the Federal Rules of Criminal Procedure, and the Sixth Amendment (Pet. No. 895, p. 75). The decisions relied upon for this argument, however, are inapposite (Pet. No. 895, pp. 74–75). They basically deal with the denial, of the right to be confronted with and cross-examine the witnesses whose evidence is sought to be introduced on the issue of guilt or innocence at a criminal trial. They have no bearing on the present situation—an eavsedrop hearing at which the officials in a position to know have submitted affidavits confirming the repeated representations of government counsel (see II H.D.A. 845–849, 853, III H.D.A. 1524) that the only records of overhearings of defendants in the government's possession are those which have been turned

[32] Compare *Lawn* v. *United States,* 355 U.S. 339, 348–349, where this Court deemed affidavits submitted by government agents and prosecutors sufficient without a hearing to overcome an allegation of taint.

over to the defense or to the trial court. Indeed, petitioner's argument is particularly weak since the district court stated that the defense could call Bolz and Green as witnesses (II H.D.A. 860–861), and the defense chose not to avail itself of that opportunity. Cf. *Baker* v. *United States,* 401 F. 2d 958, 980 n. 92 (C.A.D.C.).

2. At the express direction of the district court at the eavesdrop hearing the government submitted to that court for *in camera* inspection nine logs of overhearings which government counsel described as "isolated accidental and absolutely irrelevant overhearings of some of these defendants" (see II H.D.A. 849, 852–853; III H.D.A. 1524–1525). After inspecting the logs the district court found that they were "not remotely relevant" to the issues involved in the case (II H.D.A. 864–865). Based on its own independent examination, the majority below agreed without qualification and, relying upon its holding in *United States* v. *Battaglia,* 394 F. 2d 327, pending on petition for a writ of certiorari, No. 168, O.T., 1968, found no error in this procedure (Pet. No. 895 App. 96).

We recognize that the issue whether the results of eavesdropping may first be examined by a judge who in his discretion may then decide that they are unrelated to the case and thus should not be turned over to the defense, is presently before this Court on reargument in *Alderman* v. *United States* (on Motion to Amend the Court's Order of January 29, 1968, No. 133, O.T. 1967) and that the Court may wish to defer consideration of this question pending its decision in *Alderman.* We point out, however, that the few logs of

defendant overhearings involved in this case were found "not remotely relevant" by both courts below, and precisely fit within the classification of logs described in our *Alderman* brief as "so clearly unrelated to the case at issue that the court may easily determine that further disclosure is not necessary" (See Brief for the United States in *Alderman, id.* at 16). These logs are presently on file with the Clerk and available for the Court's inspection.

3. Petitioners broadly argue that they were deprived of their constitutional rights because the district court did not require the government to disclose to the district court or to the defense any overhearings of defense counsel (Pet. No. 895, pp. 69–72).

a. The claim that the position taken by the district court on the attorney overhearings was contrary to this Court's order of remand rests upon the assumption that by its short *per curiam* order this Court *sub silentio* meant to overturn the settled rule that only one whose "right to privacy of person or premises" has been invaded may challenge illegal government action (*e.g., Wong Sun* v. *United States,* 371 U.S. 471, 491–492; *Jones* v. *United States,* 362 U.S. 257, 261; *Goldstein* v. *United States,* 316 U.S. 114; cf. *Baker* v. *United States,* 401 F. 2d 958 (C.A.D.C.)),[33] as well as this Court's earlier admonition in *Nardone* v. *United States,* 308 U.S. 338, 341–342, that the scope

[33] Nothing said in *Mancusi* v. *DeForte*, 392 U.S. 364, or *Simmons* v. *United States*, 390 U.S. 377, did away with the established requirement that, to raise a Fourth Amendment claim, a defendant must show a right to privacy in the area subjected to the governmental intrusion. See, *e.g.*, *DeForte*, *supra*, 392 U.S. at 367–369.

of "such auxiliary inquiries" are within the sound discretion of the trial judge and may be "closely confined" so long as the issue of taint is fully explored. Cf. *Lawn* v. *United States,* 355 U.S. 339, 348–349.

Here, the district court required the government to produce all overhearings of defendants, whether relevant or not. On their side, the defense was allowed to "produce whatever evidence you can find in regard to electronic eavesdropping and the other defendants in this case, or the lawyers in this case, in which this trial was discussed or preparations for this trial was discussed" (II H.D.A. 805–806; see also II H.D.A. 857–858). That the defendants were not able to make any such showing[34] hardly establishes any improper limitation by the district court at the eavesdrop hearing.

b. Undeniably, the government had a duty to turn over to the defense or the district court all records in its possession in which a defendant was overheard talking to his lawyer. As *Black* v. *United States,* 385 U.S. 26; *O'Brien* v. *United States,* 386 U.S. 345, and *Granello* v. *United States,* 386 U.S. 1019, illustrate, the government is committed to the disclosure of any interception of a communication between a defendant and his attorney in a pending case, irrespective of whether that conversation is relevant to the issues in

[34] In accord with the guidelines set by the district court, the defense introduced a substantial amount of evidence in support of its claim of undisclosed governmental overhearing (see the details of this evidence set out in the opinion of the district court, 273 F. Supp. at 144–147; Pet. No. 895 App. 82–89). None of this evidence established the existence of any producible overhearings.

the case. We further recognize an obligation to disclose in a situation where defense counsel was overheard talking to a third party about a particular defendant's case in such a way that improper overhearing by the government could be said to have interfered with the defendant's right to counsel. The failure to make any such disclosure in this case simply stemmed from the fact that the government overheard no conversations involving counsel of record relating in any way to this case, much less one which could be characterized as relating to matters within the councils of the defense.

We stress, however, that to recognize an obligation to produce in the foregoing situations is far different from saying that a defendant, either under his own right of privacy or under his right to counsel, is entitled to production of conversations between third parties simply because one of these parties is an attorney or an alleged investigator (See Pet. No. 895 71–72) for a defendant in a criminal case. An attorney, as anyone else, engages in many different conversations with many different individuals both in his professional capacity and otherwise; obviously what he says about client B's case may not have the remotest bearing on the case of client A. The fact that the government has been guilty of illegal surveillance does not justify allowing client A to review the records of the overhearing of the conversation between the attorney and B which has no relation to A's case.

c. The logs of the overhearings of counsel of record were turned over to the court below for *in camera*

examination, not because the government believed that they had any relation to this case but because, during oral argument, the court of appeals evinced concern as to the nature and extent of such overhearings, apparently prompted by petitioner's broad claims to that effect. Our purpose was simply to remove any concern the court might have by showing that no overhearings of record counsel in our possession had even the remotest bearing on this case. The court of appeals agreed, observing that its examination of the logs revealed that the information therein "is completely irrelevant to the Hoffa case before this Court" (Pet. No. 895 App. 98).[35]

3. Petitioner Dranow separately urges that the district court's finding that he was mentally competent to participate in the hearing was erroneous.[36] The record, however, shows that Dranow was sufficiently competent to meet the standard of trial competency

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[35] There were five such overhearings of counsel of record all occurring either long before or long after the trial in this case. They were with other clients or third parties having nothing to do with any defendant in this case. The logs of these overhearings are presently on file with the Clerk of this Court.

No logs of any conversation between alleged investigator O'Brien and his counsel were disclosed to the court of appeals because the government had overheard no conversation involving O'Brien and any counsel of record in this case. Moreover, as we pointed out in our brief in opposition in *O'Brien* v. *United States*, No. 823, O.T. 1966, p. 11, in the overheard conversation between O'Brien and his counsel only O'Brien was heard to speak and then only relating to bail in a case pending against him.

[36] Petitioner Dranow's further argument that he was incompetent at the time of trial is fully answered in our original brief in opposition in the 1966 Term (Br. in Opp. in No. 1003, O.T., 1966, pp. 57–61).

adopted by this Court in *Dusky v. United States*, 362 U.S. 402, that the accused have a "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and have "a rational as well as factual understanding of the proceedings against him." It should, moreover, be noted that participation by the defendant is of much less significance at this type of hearing than would be the situation at trial. As the trial court pointed out (II H.D.A. 830):

> This is not a trial of a criminal case where it is necessary for this defendant to communicate his defenses to his counsel. This is in the nature of a motion for a new trial. There is no evidence that Mr. Dranow has any information to communicate to his lawyers that could conceivably be admissible within the confines of this limited hearing.[37]

At the competency hearing (held shortly before the eavesdropping hearing), three psychiatrists—Drs. Adams, Burris and Seglin—testified for the defense. Based on their examination of Dranow on July 24, 1967 (II H.D.A. 762, 775, 778) and their examination of the reports of psychiatrists at the Federal Medical Center at Springfield, where Dranow had been in custody since October 1966 (I H.D.A. 186), each of these doctors stated his belief that Dranow was so severely depressed as to render him incapable of assisting counsel and understanding the contemplated eavesdrop hearing (II H.D.A. 763–765, 775–776,

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[37] It was admitted by defense counsel that Dranow was incarcerated during the entire period—*i.e.*, January 1963 to July 1965—of the trespassory eavesdropping of Sigelbaum's office (II H.D.A. 831–832).

779). In addition, the defense submitted various psychiatric records relating to Dranow's incarceration in Springfield, including diagnoses to the effect that Dranow suffered from a "borderline schizophrenic reaction, paranoid type, of a chronic nature, of mild to moderate severity" (see, *e.g.*, I H.D.A. 196, 191). While several of the Springfield reports indicated that Dranow was a "paranoid schizophrenic," a progress report of July 14, 1967—shortly before the eavesdrop hearing—stated that he had improved and was "mentally and physically able" to make the trip to appear at the hearing (II H.D.A. 749–750).

The government adduced the testimony of Dr. Benjamin Kesert, a psychiatrist, who had examined Dranow on July 23, 1967 (II H.D.A. 659). He was of the opinion that Dranow was mentally competent, understood the charges against him and was able to cooperate with counsel (II H.D.A. 661–664, 665–666, 671). Doctor Kesert further testified that none of the medical reports prepared by psychiatrists at Springfield changed his views as to Dranow's mental competency (see II H.D.A. 681–682, 685–686, 689–690, 694–695, 699–700, 709–710). The trial court found Dranow competent to participate in the hearing (II H.D.A. 830).

The evaluation of the expert testimony was for the trial judge.[38] There is no reason for this Court to overrule his determination. *E.g., United States* v.

[38] While petitioner Dranow now attempts to cast some doubt on Dr. Kesert's qualifications (see Pet. No. 911, pp. 9, 11), at the hearing no defense counsel found it necessary to cross-examine Kesert concerning his qualifications as brought out in his direct examination (see II H.D.A. 656–658).

Armone, 363 F. 2d 385, 403 (C.A. 2), certiorari denied, 385 U.S. 957; *Merrill* v. *United States,* 338 F. 2d 763, 765–766 (C.A. 5); *Feguer* v. *United States,* 302 F. 2d 214, 236 (C.A. 8), certiorari denied, 371 U.S. 872; cf. *Holt* v. *United States,* 329 F. 2d 368, 372 (C.A. 7), certiorari denied, 379 U.S. 992.

II

THE ORIGINAL ISSUES ON APPEAL

As noted, the issues relating to the original proceedings are fully dealt with in our original brief in opposition in this case, and we refer the Court to that brief for our detailed response (see Government's Brief in Opposition in No. 1003, O.T. 1966, pp. 33–63). We answer here only petitioners' claim concerning an alleged violation of the right to confrontation under *Bruton* v. *United States,* 391 U.S. 123 (see Pet. No. 895, pp. 84–87).

During the cross-examination of petitioner Dranow at trial, the government sought to impeach him by reference to certain letters he had written to one Irving Link indicating that various of the defendants had put money away for him on a daily basis in connection with certain properties which were involved in loan applications (see Br. 62–63). The jury was first admonished by the trial judge to consider this evidence only against Dranow (III D.A. 2018, 2021). After further reflection, however, the court decided to exclude this evidence as to these letters even as to Dranow, and so instructed the jury (III D.A. 2065–2066).

Bruton does not govern this case. In *Bruton* this Court held that the introduction at a joint trial of a confession of one codefendant which implicated another was constitutionally impermissible under the Confrontation Clause of the Sixth Amendment, and that an insulating instruction limiting consideration of the confession to the declarant did not remove the constitutional violation. In short, this Court concluded that it was unrealistic to assume that a jury could find a confession trustworthy and believable as to the declarant, and yet disregard it as to a co-defendant specifically implicated therein. In this case the jury was not called upon to perform such "mental gymnastics" since they were instructed not to consider the evidence of the letters against *any* of the defendants. See *United States* v. *Muller,* C.A. 3, No. 17075, decided on October 10, 1968, petition for a writ of certiorari pending, No. 1244 Misc., this Term. Moreover, unlike the situation in *Bruton,* at the time the letters were referred to Dranow was a witness at trial and fully available to his codefendants for cross-examination.[39]

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[39] Petitioners' reliance upon *Bujese* v. *United States*, 392 U.S. 297, is misplaced. In this pre-*Bruton* case involving a declarant in a joint trial who testified in his own defense, this Court did not reverse the codefendant's conviction because the declarant's implicating confession was introduced at trial; this Court merely remanded the case to the court of appeals for its consideration in light of *Bruton*. In the instant case the court of appeals has already considered the implications of *Bruton* and decided that it does not control here (See Pet. No. 895 App. 101–103).

CONCLUSION

For the reasons stated herein and in our brief in opposition in No. 1003, O.T., 1966, the government is of the view that the petitions for writs of certiorari should be denied. We recognize, however, that the Court may wish to defer consideration of the petitions because one of the issues raised is presently pending in the the *Alderman* case.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

JOHN FRANZESE, also known as "Sonny," WILLIAM DAVID CRABBE, also known as "Red," JOHN MATERA, also known as "Johnny Irish," NICHOLAS POTERE and JOSEPH M. FLORIO, also known as "Whitey,"

Petitioners,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITIONERS' JOINT REPLY BRIEF

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No. 1420

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PETITIONERS' JOINT REPLY BRIEF

I.

In its brief in opposition, the United States has revealed for the first time that an electronic device was installed by trespass in the home of the Petitioner Franzese and that conversations of the Petitioner Franzese were seized over a period of at least three months. The petition for a writ of certiorari should be granted, the judgment of the Court of Appeals should be vacated, and the case should be remanded to the District Court for a hearing to determine the nature and relevance to the convictions herein of any conversations seized through the admittedly unlawful electronic surveillance of the Petitioner Franzese's home.

The briefs on appeal of the Petitioners in the Court of Appeals were filed in December, 1967. The Petitioners there requested that, prior to deciding the appeal, the Court of Appeals order the Department of Justice to conduct a plenary review of its files to ascertain whether there had

been any electronic eavesdropping relating to any of the Petitioners. In support of this request, the Petitioners cited, *inter alia,* the existence of one conceded wiretap and the characterization by the government that the case involved "organized crime."

In its reply brief in the Court of Appeals, the government termed the above requests of the Petitioners as "bizarre" and a "fishing expedition."

At the oral argument in the Court of Appeals, on February 23, 1968, the Assistant United States Attorney admitted that his office had not yet informed the Justice Department of the Petitioners' request for plenary review and disclosure, but, at the direction of the appellate panel, he undertook to do so immediately and to advise the Court as to his findings. In the Court of Appeals opinion, affirming the convictions of the Petitioners, there is no indication as to whether the United States Attorney or the Justice Department did, in fact, ever communicate this information to the Court of Appeals. Counsel for the Petitioners have no knowledge as to whether such a communication was made.

Now in a casual postcript to his Brief in Opposition (pp. 18-19), submitted on the eve of this Court's present term, the Solicitor General belatedly admits that there was indeed the most blatant trespassory eavesdropping in the home of the Petitioner Franzese for a period of at least three months.

Among the critical facts which the Government's Brief in Opposition does not reveal, are when the "bug" was installed in Franzese's home and when, if ever, it was deactivated and/or removed. Additionally, we have the Solicitor General's bare statement that it is his under-

standing that this eavesdropping had no relevance to the prosecution herein. It is improbable in the extreme that the Solicitor General's knowledge of the case is such that he can trace the tangled web of investigation and authoritatively state that the seized conversations bore no fruit which found its way into the present case. This Court has often repeated the admonition that the "essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all." *Silverthorne Lumber Co.* v. *United States,* 251 U.S. 385, 392. It is also to be noted, with no aspersion intended upon the Solicitor General, that the Petitioners had the representation of an Assistant United States Attorney in the District Court and of the United States Attorney in his Brief in the Court of Appeals that there had been *no* eavesdropping.

The Solicitor General's explanation for the Government's failure to disclose the eavesdropping earlier is thoroughly not in accord with the facts. He submits that no disclosure was required until the decision of this Court in *Kolod* v. *United States,* 390 U.S. 136, decided January 29, 1968. He omits, however, the fact that the opinion in *Kolod* was handed up to the Court of Appeals on the oral argument of this case. That oral argument took place approximately *one month after Kolod* was decided by this Court. Likewise, he does not mention that the appeal remained pending before the Court of Appeals for an additional month after the oral argument. He makes no attempt to explain why it is only now, almost five months after the decision in *Kolod,* that this revelation is made. Must a defendant in a criminal case go all the way to the Supreme Court of the United States, and only there be told of such surveillance?

As a matter of governmental integrity, particularly in light of the fact that information concerning electronic surveillance had been sought by the defense at the time of the trial, the government should have come forward with this information as soon as its legal pertinence, by virtue of *Kolod*, was clear. There is simply *no* justifiable reason for the failure of the Department of Justice to make this disclosure before the present time.

The Solicitor General would have this Court brush aside the failure to disclose—a question which was a part of the Petition for Certiorari itself, pp. 4, 30-32. Indeed, the Government would have this Court deny the Petition for Certiorari immediately, alleging that such a denial would not be prejudicial to the Petitioners. To the contrary, the prejudice of such a procedure is clear: If this Court permits the judgments of conviction to stand, several of the Petitioners, now on bail, would be remanded before the required exploration of the now questionable Constitutional basis upon which their convictions rest.

The Solicitor General claims that the Petition for Certiorari should be denied immediately "in order not to delay the final disposition of this case . . ." (Brief in Opposition, at page 19). It is not apparent to the Petitioners how this case can finally be disposed of until the disclosure proceeding has been held in the District Court. If the Government were truly concerned with an early final disposition, it could have accomplished that end by initiating a review procedure in December, 1967 when the Petitioners first requested disclosure; certainly, disclosure could have been made some time after oral argument, when the United States Attorney

finally undertook to inform the Department of Justice,* rather than at the eleventh hour. Any delay there may now be, will have been caused by the Government's own dereliction. It is no service to Justice nor to this Court to ask this Court to rule upon the issues raised in a petition for certiorari in a piecemeal manner before the proceedings below become final. Until the termination of the disclosure proceedings, this Court will have no assurance that the convictions, which the Solicitor General now asks be left standing, are free from unconstitutional taint. Moreover, to deny the petition would be to ignore—indeed reward—the Government's clear breach of its duty to disclose earlier the eavesdropping only now revealed. The effect of that breach has already been to obtain an unwarranted affirmance of the Petitioners' convictions by the Court of Appeals. In these circumstances, and in light of the serious import of the facts revealed, this Court should not be asked to give its imprimatur to convictions whose very basis may be unconstitutional.

The Petitioners believe that the questions here raised have broad impact, and that this Court should consider (a) whether the Court of Appeals should have affirmed the convictions absent the prior eavesdropping disclosure which had been requested by the Petitioners, and (b) whether the Department of Justice has implemented an adequate system for disclosing eavesdropping at an appropriate stage of the proceedings, as evidenced by the course it has taken in this case.

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* Petitioners ask this Court to note the failure of the United States Attorney to inform the Justice Department of the direct request made of it by the Petitioners until so directed by the Court of Appeals, while filing a brief dismissing the request out of hand—purportedly as agent for the Justice Department.

Counsel for the Petitioners were not served with, nor have they yet had an opportunity to obtain the Brief for the Government in *Scandifia* v. *United States,* No. 1290, this Term, currently pending. In effect, the Solicitor General incorporates by reference in his present brief, at page 19, the arguments which were contained in his brief in *Scandifia.* We have no way of knowing what those arguments are! We urge that a final disposition by this Court of the issues raised by our joint Petition for Certiorari and by this Answering Brief await the service upon the Petitioners of the Government's brief in *Scandifia* and we be given an opportunity to reply to any additional arguments contained therein.

For the reasons stated, Petitioners request that the Writ of Certiorari be granted, that the judgment of the Court of Appeals be vacated, and the case remanded to the District Court for a hearing, findings, and conclusions of the nature and relevance to these convictions of any conversations that may be shown to have been overheard through the admittedly unlawful electronic surveillance of Petitioner Franzese's home. This was the procedure adopted by this Court in *Kolod* v. *United States,* 390 U.S. 136. In the alternative, the Petitioners request that this Court retain supervisory jurisdiction without denying the petition, pending the outcome of the disclosure proceedings in the District Court.

II.

Concerning payments made by the Petitioner Potere to the attorneys for Parks and Cordero.

In our Petition for Certiorari, at pages 28-30, we urged that the Government's case at trial was devoid of proof of the Petitioners' alleged involvement in the bank robbery conspiracy, aside from the testimony of the Government's four bank robber-witnesses whose testimony had been bargained for by the Government.

In its Brief in Opposition, at page 6, the Government states:

> "The lawyers who represented Parks and Cordero following their arrest testified that they received approximately $1,100 from Potere for Parks and $960 from Potere and Cordero, to be used primarily for attorney's fees and bail."

The above statement is utterly misleading, and wrongly conveys the impression that the attorneys' testimony corroborated the allegation that, *as part of the conspiracy,* Potere "put up" the funds in question for the purposes alleged. The Petitioners are impelled to correct that impression.

Parks and Cordero were two of the Government's bank robber-witnesses; Potere is one of the Petitioners herein. The attorneys in question were witnesses for the Government, and they did not testify that Potere "put up" the money, but rather that their clients had instructed them to try and collect a loan which had been made to Potere, that they (the attorneys) had communicated this fact to Potere, that Potere acknowledged the debt and that Potere eventually paid the debt to them. (2648-2704; 2785-2797).

CONCLUSION

For all of the foregoing reasons, and for those reasons contained in the Petition for Certiorari, it is submitted that the Writ of Certiorari should be granted, and the judgment of the Court of Appeals should be remanded to the District Court for a hearing, findings, and conclusions on the nature and relevance to these convictions of any conversations that may be shown to have been overheard through the admittedly unlawful electronic surveillance of Petitioner Franzese's home, or, in the alternative, that this Court should retain supervisory jurisdiction, without denying the Petition, pending the outcome of the disclosure proceeding in the District Court. If this Court adopts the proposal, urged by the Government and opposed by the Petitioner, that the issues presented by the Petition for Certiorari be now disposed of without reference to the newly revealed electronic surveillance, then the Petition for Certiorari should be granted as to those issues.

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No. 124

In the Supreme Court of the United States

OCTOBER TERM, 1968

JOSEPH AIUPPA,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

---

REPLY TO THE BRIEF FOR THE UNITED STATES IN OPPOSITION TO THE PETITION FOR CERTIORARI

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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 124

JOSEPH AIUPPA,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

REPLY TO THE BRIEF FOR THE UNITED STATES IN OPPOSITION TO THE PETITION FOR CERTIORARI

Now comes the Petitioner, Joseph Aiuppa, by his attorneys, Maurice J. Walsh and John Powers Crowley, in reply to the brief of the United States in opposition to the Petition for Certiorari, and states as follows:

IN RESPONSE TO EAVESDROPPING DISCLOSURE MADE FOR THE FIRST TIME IN THE "BRIEF OF THE UNITED STATES IN OPPOSITION" TO THE PETITION FOR CERTIORARI.

Although this case was tried in the United States District Court for Kansas at Kansas City, Kansas, and appealed to the Tenth Circuit Court of Appeals, reversed and re-tried in the District Court at Fort Scott, Kansas, appealed and affirmed, it is only in its Brief in Opposition to the Petitioner's Writ of Certiorari, that the United States for the first time states: "We have the duty, however, to advise the Court that on December 5, 1961, prior to the commission of the offenses here involved, Petitioner was overheard by an electronic device installed by trespass in a commercial establishment."

No disclosure of any kind of these statements of the Petitioner has even been made by the United States, or is made to the Petitioner by its revelation in this Court. The Government curtly suggests that this Court deny Certiorari and remit the Petitioner to the remedies of a post-conviction defendant.

This Court has, on several occasions, refused to follow almost identical suggestions by the Government, and no reason is given by the Government to induce this Court to alter the course taken in *Black* v. *United States,* 385 U.S. 26, *Hoffa* v. *United States,* 387 U.S. 231, *O'Brien* v. *United States,* 386 U.S. 345, *Granello* v. *United States,* 386 U.S. 1019, and *Schipani* v. *United States,* 385 U.S. 372.

It is urged that the Government makes no representation that the overhearing on December 5, 1961 is the only overhearing of the Petitioner. It makes no representation concerning any electronic eavesdropping on his attorney,

or his wife, who was charged as a defendant in the offense, or upon any of the witnesses or original co-defendants. No revelation is made to this Court as to the "general" nature of the eavesdropped material, or of the nature of the trespass, that is, whether housebreaking, wiretapping, or radio devices. No revelation is made as to whether the conversations overheard were preserved on the tapes, or whether, as is usually the case, the tapes were destroyed, and the evidence remaining is an editorialized version by a government agent of the fruits of his illegal trespass upon a so-called "log".

The Petitioner, under the post-conviction procedure, prescribed by the Solicitor General as the appropriate relief, would be denied the ordinary due process of a motion for the return of the property (conversations) seized and their suppression as evidence, and of a motion for production of his statements under Rule 16(a) as it became effective in 1966.

Certainly, the illegal trespasser against the Fourth Amendment rights of the Petitioner, should not now be elevated to guardianship of illegal evidence, expensively obtained under the guise that it is of no value, and on the claim of solicitude for privacy.

The Petitioner respectfully urges that the Court vacate the judgment and remand for a new trial so that the Petitioner's rights under Rules 16(a) and 41 of the Federal Rules of Criminal Procedure and due process thereunder can be duly administered and protected.

It is further respectfully suggested that *in camera,* or as in this case, ex parte examination of evidence obtained by illegal trespass in violation of the Fourth Amendment rights is not due process of law and is not consistent with what this Court has said is our adversary system.

REPLY TO THE POINTS MADE IN THE "BRIEF OF THE UNITED STATES IN OPPOSITION" TO THE PETITION FOR CERTIORARI.

1. In attempting to argue that the evidence introduced through the testimony of the witness Williams was not tainted by virtue of the illegal search and seizure, the Solicitor argues that, "the Government's knowledge was based on an independent source and was not the product of the subsequent illegal search." (Br. p. 4). This statement is simply not supported by the record.

At the hearing on the motion to suppress, the government agent testified that he did not know what was in the car until informed of the results of the illegal search (App. 27), and further testimony disclosed that Williams was not arrested or interviewed *until after the illegal search* confirmed a suspicion that there were dead birds in the store in Kansas, and in the car of Aiuppa and his wife when searched in Chicago, Illinois. (App. 166-167). Therefore, it is clear that the testimony of Williams was a lead obtained from an illegal search and seizure, and his testimony should have been stricken. The government, at no stage of the proceeding, has made any effort to *prove* its evidence untainted. It merely presumes it and invites this Court to presume irrationally and to infer without proof.

Further, the Solicitor in reply to this point of argument ignores another portion of the question raised: What is the burden upon the Government to prove that its evidence was not obtained as the result of a lead emanating from an illegal search and seizure? The Solicitor apparently relies upon alleged indefinite information given by an unknown informant prior to the illegal search complained of here.

Both the District Court, and the United States Court of Appeals, sitting in review of the District Court, completely ignored the mandate of this Court in *Chapman* v. *California*, 386 U.S. 18, 23, 24, to the effect that the sufficiency of evidence indicating guilt cannot be the basis for affirming the conviction unless the reviewing court can say beyond a reasonable doubt that the tainted evidence did not contribute to the conviction. Further, it is the burden of the government to show that the evidence it offers is not tainted by admitted illegality.

In the prosecution of this case, both the prosecutor in the District Court, who represented the Government on appeal before the Tenth Circuit, and the Solicitor General, who represents the government here, have ignored totally the effect of the *Chapman* case which laid down their burden as being that the government must "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman* v. *California*, 386 U.S. 18, 24.

We respectfully submit that a clear violation of the defendant's Fourth Amendment rights existed, and the burden of the Government was to prove that its evidence was not a tainted product of a lead emanating from the illegal search and seizure, beyond a reasonable doubt. *Chapman* v. *California*, 386 U.S. 18. We further submit that this Court should issue its Writ of Certiorari to determine whether testimony of a witness, obtained from a lead derived from an illegal search, is the fruit of a poisonous tree. This question was left open in *Harrison* v. *United States*, 392 U.S. 291, fn. 9, and should be resolved here. C.f. *Wong Sun* v. *United States*, 371 U.S. 471, 485, 486, 487; *Nueslein* v. *D.C.* 115 F.2d 690.

2. In answer to the contention of the petitioner that his conviction violates due process since it was not supported by the evidence, the Solicitor relies upon the well-

established principle of *Glasser* v. *United States,* 315 U.S. 60, 80, that the jury may draw reasonable inference from the facts proved, and on appeal the evidence and inferences must be construed most favorable to the Government. We do not contest this well-established principle of law. However, the Solicitor attempts to raise the "assumptions" of the witness Williams (App. 161, 164-165) that the petitioner possessed more than the legal limit to the level of inferences. We respectfully submit that an inference is permissible only when there is an established fact, but an assumption operates without a fact. We submit that to "assume" the petitioner's guilt, as did the Court of Appeals (App. A. p. 4) in this case, violates due process.

3. It is impossible to reconcile the position of the Solicitor in relation to prejudice in news reporting in this case with his position in *Janko* v. *United States,* 366 U.S. 716. The news articles which were the basis for the petitioner's motion to interrogate the jurors, and which had been purchased by counsel for the petitioner in the streets of Fort Scott, Kansas, were, in the words of the Court of Appeals, "to be sure prejudicial." (App. A. 11). The articles (App. 280-283) referred to the petitioner as a gangland figure, referred to the petitioner's possession of 500 doves and to the fact that his original conviction for the possession of these doves had been reversed by the Tenth Circuit because of an illegal search and seizure.

In confessing error in almost identical circumstances in *Janko* v. *United States,* 366 U. S. 716, the Solicitor stated:

> "The nature of the newspaper article in question, especially in its reference to the outcome of the prior trial and to petitioner as a 'former convict' and a 'former employee of East Side rackets boss Frank (Buster) Wortman'—a recipient of considerable adverse publicity in the St. Louis press—was such as to

raise substantial doubt as to whether if it did in fact reach the jurors the inadmissible prejudicial information could be wiped out of a juror's mind. *Marshall* v. *United States,* 360 U.S. 310.

"In the light of the character of the extraneous information contained in the article, we think that, before the jury was finally discharged, *the trial court should have assured itself as to whether the jurors had in fact read the article.*" (Emphasis supplied).

We respectfully submit that this case merits the issue of this Court's Writ of Certiorari on this question alone in order to set down firm guidelines to be followed by the various district courts throughout the United States when prejudicial news articles appear during a trial. See also *Silverthorne* v. *United States,* No. 21,221, C.A. 9, Decided August 27, 1968.

4. The Solicitor does not dispute the contention of the petitioner that there is a conflict in the circuits over the permissibility of allowing a jury to separate, without supervision, during its deliberations. However, the Solicitor urges this Court not to adopt the absolute rule against separation laid down in the Seventh Circuit, *United States* v. *D'Antonio,* 342 F.2d 667, and *United States* v. *Panczko,* 353 F.2d 676, on the basis that the law of the Seventh Circuit Court of Appeals, whose major business comes from Chicago, should be different than law in the Tenth Circuit in which this trial was held. We submit that such a provincial attitude by the Solicitor is not warranted in this case.

The Constitution and the statutes enacted by Congress do not provide for any different application of due process and fair trial standards between metropolitan area and rural area residents.

The conflict in the circuits presented in this case, should not and cannot be resolved fairly or rationally, by resort to population. The question of the separation of the jury, during deliberations, is so crucial to the uniform administration of justice that this Court should issue its Writ of Certiorari to resolve this conflict between the Seventh and Tenth Circuit Courts of Appeal.

5. The issue presented under this question: whether a court may, over specific objections, instruct the jury that a defendant cannot be "compelled" to testify, and no presumption of guilt and no inference of any kind may be drawn from the "failure" of a defendant to testify has been left unresolved by prior opinions of this court. We respectfully submit that to so instruct the jury over the objection of a non-testifying defendant is as violative of the Fifth Amendment as the statutory permissiveness condemned by this court in *Griffin* v. *California*, 380 U.S. 609 and *Chapman* v. *California*, 386 U.S. 18, and that this issue is sufficiently important to the uniform administration of justice in the federal courts so as to require this court to issue its Writ of Certiorari, to compel compliance with decisions of this Court.

CONCLUSION

For the reasons stated herein, and in the Petition for Writ of Certiorari, this Court should issue its Writ of Certiorari to review the decision below.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1968

No. 168

SALVATORE BATTAGLIA, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONER

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---

REPLY BRIEF FOR PETITIONER

QUESTION ONE

Will this Court tolerate the birth of the doctrine of "indefinite outline"—a device for extending beyond control the reach of every federal conspiracy prosecution?

The Solicitor General's response seeks to obscure this important question by two familiar techniques:

1. Guilt by Consolidation

The response is directed at petitioners Evans, Amabile, and Battaglia together, but their togetherness in the case and in some deceitful venture adds nothing to the Government's argument that Battaglia was also a partner in a conspiracy to extort by threats of violence.

2. Sufficiency of the Evidence

That spurious characterization of the question presented only highlights the importance of the question tendered: May the Government implicate a man in the violence of others, not upon evidence, but upon a legal theory that a conspiracy is of "indefinite outline", when there is also *no evidence* that any such open-ended agreement was formed.

Although it was used by both lower courts, the Solicitor General purports to read that theory out of the case, by suggesting that there was evidence of a traditional nature to support the finding that Battaglia would have tolerated violence if deceit failed. The Government's brief is replete with innuendos: that Battaglia was a "silent partner", that there was a "criminal hierarchy", that Amabile was "Battaglia's subordinate" in that hierarchy. Each of these charges leaves the critical question still open: A "silent partner" in what venture? To defraud? To extort? To kill, if necessary? In any event, however, the Government's brief is conspicuously devoid of record references for each of these insinuations. There are *no* record references, because there was *no* evidence to support these conclusions. Accordingly, the response makes all the more plain that the Government found a substitute for evidence—a novel and pernicious theory of conspiratorial responsibility.

QUESTION TWO

The Solicitor General conspicuously fails to rebut the one feature of the grand jury minutes question that calls for a hearing in this Court—the existence of a sharp and widespread conflict among the Circuits.

Instead, the response chastises the defense for refusing to accept submission of the minutes to the Court for *in camera* inspection.* Parenthetically, the defense did not affirmatively reject that suggestion. (R. 195). But more importantly, open defense access to the minutes is at the heart of the *Dennis* conflict.

QUESTION THREE

The Solicitor General seeks to avoid review of the questions raised under *Smith* v. *Illinois*, 390 U.S. 129 (1968), by contending that the court properly denied cross-examination as to Riley's residence because this was a case involving threats of violence to Riley. As to petitioner Battaglia, the attribution of violence depends upon the unwarranted theory of conspiracy challenged in Question One. And in any event, the existence of an exception for violence cases, and the hearing requirement implied by any such exception, are the very questions left open by *Smith* that call for review.

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* Curiously, the Government now simultaneously contends that the minutes contained only material to which the defense already had access. Was there then *no* governmental interest in denying disclosure at trial? Moreover, as the later disclosure of Riley's testimony shows, the grand jury minutes would have been critical to test whatever basis there was for the attribution of violence to the petitioner. (Pet. 22).

QUESTION FOUR

The Solicitor General would permit the Court of Appeals to determine the relevance of illegally monitored material in cases where that court is also called upon to conduct a full-scale evidentiary review. That suggestion reflects the improperly limited view of "relevance" the Government entertains. For even in the course of an evidentiary review, the Court of Appeals cannot assess whether the contraband material furnished "relevant" *leads* to subsequently tainted evidence.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968.

No, 546.

JAMES R. HOFFA, THOMAS EWING PARKS and
LARRY CAMPBELL,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITIONERS' REPLY.

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IN THE

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OCTOBER TERM, 1968.

No. 546.

JAMES R. HOFFA, THOMAS EWING PARKS and LARRY CAMPBELL,
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v.

UNITED STATES OF AMERICA,
Respondent.

PETITIONERS' REPLY.

In its Brief in Opposition to the petition for a writ of certiorari, the Government states that, in light of this Court's decision in **Kolod v. United States**, 390 U. S. 136 (1968), it now wishes to disclose that it monitored by electronic surveillance an undisclosed number of conversations in which two of the petitioners participated.

This amazing disclosure is now made to this Court for the first time, after almost twenty months of petitioners' incarceration, and although the Government in its "Memorandum for the United States in Opposition to Petitioners' Motion for Relief" in this Court's original review of this case (Nos. 32-35, O. T. 1966) stated that petitioners' allegations of electronic eavesdropping were "without foundation in fact." The Government also stated at that time that its review of its files did not support a claim that "electronic eavesdropping or wiretapping affected petitioners' convictions."

Under these extraordinary circumstances, petitioners urge that this Court should grant their petition for a writ of certiorari, and should set aside the judgments of conviction rendered below on March 12, 1964. Only such a ruling by this Court will serve as a deterrent to the government against similar affronts to the fairness of federal law enforcement. In this respect, petitioners respectfully refer the Court to the allegations set out in detail in their Motion to Set Aside the Judgments of Conviction, and the supporting brief, being filed simultaneously with this reply.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 895

JAMES R. HOFFA, ZACHARY A. STRATE, JR., S. GEORGE BURRIS, ABE I. WEINBLATT, and CALVIN KOVENS.

Petitioners,

vs.

UNITED STATES OF AMERICA,

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

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JAMES R. HOFFA, ZACHARY A. STRATE, JR., S. GEORGE BURRIS, ABE I. WEINBLATT, and CALVIN KOVENS.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

REPLY BRIEF FOR PETITIONERS

I. THE USE OF ILLEGAL EAVESDROP TO TAILOR PROSECUTION

While Respondent accedes that a "tainted" conviction should not stand, its Brief in Opposition (Br.) persists in a rather sphinxlike response to what standards *should* apply to determine if "taint" does exist. Respondent urges

only that its case, "predicated upon years of extensive, independent investigation predating the unplanned overhearing," could not be affected by the government's illegal activities (Br. 25). Should this Court fail to undertake a definition of the nature of "taint" and just how infectious governmental illegality must be before the convictions become diseased, the government will have an effective carte blanche whenever illegal eavesdrop occurs subsequent to the return of an indictment.

To expiate the government's sins of admitted illegal activities against the petitioners and their counsel and the obvious use made of the only eavesdropped conversation made available to petitioners, respondent relegates the tailoring of agent Connors' accounting summaries and testimony at trial to destroy the defense disclosed by the eavesdropping to a deprivation of "at best a defense in mitigation" (Br. 29). Judge Swygert, of the Court below, on the other hand, concluded: "Agent Connors, pursuant to the directions of the government prosecutors, tailored his accounting summary and his testimony. Thus, the government attempted to forestall or destroy the defense indicated in the overheard conversation . . . ." (App. F., p. 112). In any event, no matter what type of deprivation occurred, the effect was a "use" of the eavesdropped conversation to the detriment of the defendants.

Respondent implies that Connors' altered accounting summaries and restricted testimony at trial was merely an innocent decision by government counsel and that there is "no reason to read sinister implications" therein (Br. 29). The plain facts are otherwise: During the week of

September 30, 1963, Connors conferred with government prosecutors with regard to his preparation of summaries of Key West Foundation expenditures for the forthcoming trial and was instructed that such summaries were to include *all* expenditures made by Key West Foundation through April 30, 1961 (H.D.A. 221-22). On December 2, 1963, Burris was illegally overheard to advance the defense that the monies were spent on the property, albeit differently. Thereafter, the log of the eavesdropped December, 1963 conversation was routed to Connors (H.D.A. 1342), who then made summaries of it (H.D.A. 1052, 1273-77). Copies of at least one of these summaries was transmitted to trial prosecutors and was read by at least four of them (H.D.A. 126-27, 1114). Trial prosecutor Poretz wrote "Does this check out?" in the margin of the summary alongside the recitation of the proposed defense (H.D.A. 48, 126). They then instructed Connors, about one week before his testimony at trial (H.D.A. 593-97), to prepare new accounting summaries altering the period of time covered by the Key West Foundation expenditures, so that such summaries contained no references to expenditures made in 1961 (H.D.A. 1030). He prepared such new summaries and destroyed the old (H.D.A. 594, 1017, 1019).

Why did the prosecutors cause this change? Only Judge Swygert in the Court below specifically considered this question (See, *supra*). The only catalystic event which prompted this change of proof was the disclosure to government counsel of the defense revealed by the eavesdrop and contained in the summaries routed to them and read by the four government trial attorneys.

The prosecutors' involvement with this change in plans as prompted by the overhearing is documented by the patently pertinent marginal notation, "Does this check out?" written on the summary immediately alongside the proposed defense (Pet. 19).[1]

Other pertinent disclosures of facts and defenses have been urged in the Petition (Pet. 57). Suffice it to say, the respondent's contention that the overhearing was not used in any fashion is contradicted by the cryptic marginal notations on the summary of the log of the overhearing. How much "use" is necessary to constitute "taint" is a matter yet to be decided by this Court. Clearly, whatever standard may be delineated here, the subtle tailoring of the government's evidence through agent Connors' trial schedules and testimony after learning of the eavesdropping, is "taint" under any criterion which may be promulgated here.

That some standards must be promulgated is assured. This case is the first to present for review the results of this Court's direction to a lower Court to determine the effect of illegal governmental eavesdropping and therefore the petition for certiorari should be granted.

II. FAILURE TO FURNISH DOCUMENTS PRODUCIBLE UNDER 18 U.S.C. § 3500.

Petitioners' argument that the government unilaterally usurped the trail Court's function of determining whether Connors' summaries of the Burris-Sigelbaum eaves-

[1]Citation is to Petitioner's Petition for Writ of Certiorari. No. 895 O. T. 1968.

dropping and the memorandum of the type of accounting summaries to be prepared by him for trial is answered in two parts by respondent.

1. The summaries of the log are claimed not to have relevance to Connors' testimony, and in any event, it is urged, they would not have added anything to what the defense did already know (Br. 30-31). The former position is sustainable only if this Court's decisions in *Rosenberg v. United States*, 360 U. S. 367, and *Palermo* v. *United States*, 360 U. S. 343, are discarded, for the question of relevance was held to be in those cases a matter for the Court and not to be decided unilaterally by the government. The latter position is a misinterpretation of *Rosenberg, supra* and *Killian v. United States*, 368 U. S. 231. The critical factor in all such "Jencks" cases is the question whether the government's failure to disclose kept from the defense the *impeaching fact* which would have been available from the hidden statements. Unlike *Rosenberg*, where the impeaching fact was a loss of memory referred to in the "3500 statement," yet actually disclosed on cross-examination, here the impeaching fact was Connors' knowledge of the defendants' proposed defense of the use of the funds in 1961. This fact was determinable only from his memoranda of the overheard conversation and not from the records of Key West.

This relevancy contention is at once answered by the nature of this impeaching fact, for the formulation of Connors' trial charts and his testimony were subject to substantial attack on the issue of the Key West expenditures, had his summaries of the eavesdrop been made available to the defense.

2. Since relevancy is more obvious as to Connors' October 8, 1963 memorandum relating to his conversations concerning his preparation of his accounting charts, respondent claims only that "It is not clear, however that this document was a 'statement' within the purview of 18 U. S. C. 3500" (Br. 32). Respondent's position is sustainable only if *it* is the final arbiter of what is a "statement" within the meaning of the statute since it urges that memorandum "was not a report of his accounting work but rather a report on a conversation in which work was asked to be performed" (Br. 32). Respondent's semantic distinctions are no more than an effort to add the niceties of ancient common law pleading in the interpretation of what is a producible statement. Such previous effort was rejected by the Second Circuit in *United States v. Ariles*, 315 F.2d 186, 190-91, vacated 375 U. S. 32, aff'd., 337 F.2d 552. Irrespective of what the memo is a "report" of, it is indeed a "written statement made by . . . [the] witness and signed . . . by him" which "relates to the subject matter as to which the witness has testified," and is thus clearly a "3500 statement" (18 U. S. C. 3500).

Finally, grudgingly conceding the October, 1963 memorandum might be such a "statement," respondent urges "it had marginal—if any—impeaching value" (Br. 32). This Court has declared that ". . . whether the statements may be useful for purposes of impeachment is a decision which rests, of course, with the defendant himself." *Scales v. United States*, 367 U.S. 203, 258, and that "an appellate court should not confidently guess what defendant's attorney might have found useful for impeachment purposes in withheld documents to which the defense is entitled." *Rosenberg v. United States*, 360 U. S. 367, 371.

The decision of the Court below countenancing these positions of respondent is contrary to the principles previously declared by this Court. Certiorari should be granted to assure that there shall be no dissipation of those principles so as to permit the government to be the final arbiter of "Jencks" issues.

III. THE WITHHOLDING OF EVIDENCE FAVORABLE TO THE DEFENSE.

Respondent's Brief in Opposition totally avoids commenting upon the Seventh Circuit's revolutionary construction of the due process clause of the Fifth Amendment and its total emasculation of this Court's holding in *Brady v. Maryland*, 373 U. S. 83. This newly promulgated principle sanctions governmental suppression of evidence favorable to an accused where the same is material to guilt or punishment, as long as the matters suppressed "were not used at the trial" and as long as "they did not lead to any other evidence which was used at trial" (App F., p. 100).

The crux of respondent's position is merely that "In view of [the suppressed memoranda's] limited value, the failure to disclose these documents for impeachment purposes hardly can be categorized as a due process violation"[2] (Br. 33). The question of impeaching value of these

[2]The use of the summaries of the eavesdropped conversation for impeachment notwithstanding, by suppressing the summaries, the government also withheld from the defense the government's knowledge that Sigelbaum had documentary proof that he (Sigelbaum) had a claim to petitioner Burris' alleged ten percent interest in Sun Valley. Obviously, such evidence would have been of benefit to all petitioners because the government proceeded at trial to offer evidence that the ten percent interest was Burris', was paid for by Burris, and that this was a part of the "mail-out" of Sun Valley.

documents should not be a unilateral governmental decision made by its own act of suppression. Respondent's reluctant concession of some "limited value" of these documents to the defense at once brands their suppression as violative of petitioners' rights.

The decision of the Court below presents for this Court's consideration the correctness of its unique standard for ascertaining when the quantum of such suppression becomes a violation of due process. The Seventh Circuit's new test of the application of the *Brady* principle permitting governmental suppression as long as the materials were not used at trial and did not lead to other evidence used at trial eviscerates all significance of *Brady*. One cannot conceive of any situation where *favorable* evidence to an accused would fall within the Seventh Circuit's test requiring use at trial. "Use at trial" by the government and "favorable to the accused" are mutually inconsistent.

The grant of certiorari here will permit the reaffirmation of the full import of *Brady* and the principles of due process. To permit the lower Court's new standard to remain untramelled is to effectively reverse the *Brady* opinion.

IV. THE APPLICABILITY OF CHAPMAN v. CALIFORNIA HEREIN.

This Court's remand to the District Court to determine "taint" was there met by a consideration of the issue judged by a standard of proof requiring a mere *prima facie* showing that the convictions were not "tainted" (App. D., p. 76). The Court of Appeals affirmed this

test (App. F., p. 93), and respondent in a footnote claims this Court's contrary standard of "beyond a reasonable doubt" (*Chapman v. California*, 386 U.S. 18), is here inapplicable because this point had not been urged before (Br. 25).

Respondent is mistaken in its claim that *Chapman* is urged by petitioners for the first time in this Court. Following the receipt of the Seventh Circuit's opinion, petitioners, in a timely filed Petition for Rehearing, asserted the *Chapman* rule as controlling for the determination of "taint" (Pet. for Reh. p. 3). Moreover, petitioners urged that the opinion below itself was contrary to another written by its author, Chief Judge Castle, in *United States v. Lookretis*, No. 16088, decided July 15, 1968, Petition for Rehearing denied, September 11, 1968 (Pet. for Reh. p. 3).

Respondent also apparently claims that the cases cited in the Petition and which follow *Chapman* apply only if the illegally seized evidence is itself introduced at trial (Br. 25). There is no logical basis to distinguish those cases from the instant case where this Court remanded the cause to determine if the admittedly illegal evidence was used so as to "taint" the conviction. Indeed, respondent offers no rationale for such dichotomy. If in determining, as in this case, whether the illegally obtained evidence was utilized and thus whether the convictions were "tainted," the *Chapman* standard is to be applied differently from those cases where it is clear from its introduction at trial that the evidence was used but the issue is only whether such use prejudiced the accused, then this Court should so declare.

Inasmuch as this appears to be the first case after *Chapman* deviating from its principles, certiorari should be granted so that this Court may explicate if a Constitutional violation is to be measured by the *Chapman* test differently in a post-indictment hearing ordered by this Court to determine whether illegally obtained evidence tainted the convictions.

V. OVERHEARINGS OF DEFENSE COUNSEL AND INVESTIGATORS

Though asserting that only those whose right of privacy has been intruded upon by the government may challenge illegal government action (Br. 36), respondent nevertheless concedes, "We further recognize an obligation to disclose in a situation where defense counsel was overheard talking to a third party about a particular defendant's case in such a way that improper overhearing by the government could be said to have interfered with defendant's right to counsel" (Br. 38). We conclude respondent has conceded that the overhearing by the government of a defendant's counsel in some undefined circumstances gives the defendant the right to challenge that intrusion. Respondent has yet to define what those circumstances are. We urge this Court to do so.

Respondent states, "The trial lasted about 13 weeks and involved the testimony of approximately 140 witnesses and the introduction of several thousand exhibits. The trial transcript exceeds 16,500 pages" (Br. 26). Yet, it urges that the government can and has made the judgment that the overhearings of counsel "were with other clients or third parties having nothing to do with any defendants

in this case" (Br. 39). Respondent's omniscience is overwhelming, but petitioners suggest that this is a matter better left to judgment by those whose rights have been affected. Only petitioners and their counsel can establish, if at all, the relevance of such government illegality to the vast morass-land of this case and the multi-faceted efforts performed by them in preparing for trial.

In addition, petitioners question whether respondent's assertion that as to trial investigator O'Brien ". . . the government had overheard no conversation involving O'Brien and any counsel of record in this case" (Br. 39) is more fine tuning of an already distorted picture. O'Brien was represented in the trial proceeding of *O'Brien v. United States*, 386 U. S. 345, by James Haggerty, who then represented petitioner Hoffa. Haggerty was counsel of record for Hoffa in the case below (D.A. 2) until his death.

The government has now admitted illegally intercepting conversations of defendants, their attorneys, and their investigators, but because the government determines unilaterally that nothing relevant was learned, it urges no harm was done. When and how does this all end? Now, for the first time, it discloses that five conversations of attorneys were overheard. We speculate from the piecemeal, begrudging disclosures made over a nearly six-year period since the indictment whether we have yet seen the end.

We urge this Court to grant the Petition so that such intrusions upon conversations of defense counsel and investigators may be clearly declared violative of the rights of defendants and that the precise limits of such activities may be defined to protect the rights of the accused.

VI. THE UNCONSTITUTIONALITY OF RULE 27, FEDERAL RULES OF CRIMINAL PROCEDURE.

The government has failed to meet the issue raised by petitioners that Rule 27 of the Federal Rules of Criminal Procedure, permitting proof of an official record or the lack of such record by an authenticated written statement, is in conflict with a defendant's right of confrontation under the Sixth Amendment. Indeed, the government does not deny the existence of such conflict. Rather, it takes the position that the teachings of the decisions upholding the defendant's right of confrontation and cross-examination (*Mattox v. United States*, 156 U. S. 237; *Pointer v. Texas*, 380 U. S. 400; *Alford v. United States*, 282 U. S. 687) have no applicability to a proceeding where, as here, the issue is whether a conviction is tainted by the government's illegal misconduct. The government would thus defend the use of affidavit evidence and the denial of the right of confrontation in any proceeding subsequent to verdict.

Neither Rule 27, Fed. R. Crim. P., nor its related Rule 44, Fed. R. Civ. P., contain any distinction as to pre-judgment or post-judgment proceedings. Further, it must be remembered that this Court vacated the judgment of the Court of Appeals and remanded the case to the District Court for further proceedings with instructions to enter new judgments if the District Court found that the convictions were not tainted by the government's misconduct.

Moreover, the constitutionality of Rule 27, Fed. R. Crim. P., cannot rest on whether its violation occurs before or after judgment, particularly where the issue at bar is government misconduct which the wrongdoer has

chosen not to disclose until after judgment. If the defense had learned of the illegal eavesdropping during the trial, and the District Court held a hearing on the effect of such eavesdropping on the evidence then being presented, could the government contend that such a hearing was not a criminal trial in which the accused is entitled to the protection of his constitutional guaranties? Can the precious constitutional right of cross-examination be vitiated merely by the government's choosing *ex parte* to withhold disclosure of its wrongdoing until the jury verdict has been obtained and the matter is under review? The Sixth Amendment becomes a meaningless formality if its applicability rests on the unilateral determinations of an agency of the government. Clearly, the issue here presented, the real conflict between a rule of criminal procedure and a constitutional provision, warrants the consideration and definitive ruling of this Court.

VII. THE PREJUDICE ENSUING FROM CO-DEFENDANT'S ADMISSIONS.

In seeking to distinguish *Bruton v. United States*, 391 U. S. 123, from the facts in this case, the government first gives a distorted and erroneous description of the highly incriminatory evidence introduced at trial. The government thus states that the "Link letters" indicated merely that "various of the defendants had put money away for [Dranow] on a daily basis in connection with certain properties which were involved in loan applications" (Br. 42). Actually, these letters constituted an outright confession of wrongdoing, since they contained an offer by Dranow to accept the blame in order to protect others (D.A. 1910), and that in consideration therefor he

wanted certain of the other petitioners to make substantial "payoffs" to him (Tr. 14399). The letters thus were gravely prejudicial to all petitioners and constituted the type of confession which this Court in *Bruton* held could not be eradicated from the minds of the jurors by a cautionary instruction to the jury.

As Judge Swygert stated below:

> ". . . The letters were inherently prejudicial to all defendants. Together they conveyed a strong inference of guilt of all; as to those named in the second letter, the inference was inescapable that they were guilty of some misconduct for which they could be blackmailed for an indefinite period of time. Asking a jury to compartmentalize or disregard such evidence was an impossible task . . ." (App. p. 41).

Further, the mere fact that, as the government suggests, the trial Court, after having admitted the testimony, then instructed the jury to disregard the evidence as to all defendants, similarly cannot have the effect of removing from the minds of the jury evidence which the dissenting Judge found so "inherently prejudicial to all Defendants" as to require a severance from Dranow.[3]

This is especially true here, where the evidence was first presented to the jury on Tuesday afternoon, July

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[3]In its opposition to the prior petition for certiorari, *Hoffa* v. *United States*, No. 1003, O.T. 1966, the Government specifically relied on the now overruled holding in *Delli Paoli* v. *United States*, 352 U.S. 232, to support the lack of prejudice to petitioners.

14 (D. A. 1910; Tr. 14,387), and not withdrawn from their consideration until Monday, July 20 (D. A. 2065; Tr. 15,380). In the interim six days, there was published the inflammatory newspaper article relating the contents of the "Link letters," which juror Gogerty circulated to the other jurors during the intervening weekend (D. A. 311-13). As Judge Swygert concluded below:

> ". . . There can be little doubt that the prosecutor's efforts to impeach Dranow in this manner were in fact attempts to inject highly inflammatory material into the case prejudicial to all the defendants. The courts have consistently held that the harm thus created cannot be undone by instructions from the trial court . . ." (App. p. 41).

In addition, the government has failed to respond to petitioners' argument that evidence of incriminating admissions by co-defendant Burris on highly relevant issues brought this case within the purview of the *Bruton* holding, particularly since Burris did not testify at trial.[4] Instead, the government argues only that since Dranow

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[4]Other incriminating admissions by co-defendants Kovens and Dranow were testified to by government witness Vaughan Connelly over objection. He testified that Dranow, in a telephone conversation in which Kovens was also a participant, had made demands on him for the payment of money in exchange for a Pension Fund loan; that "Mr. Hoffa was raising hell, and expected it because he had paid all the money"; and, that he "did not want to see any . . . . . bodily harm" come to Connelly (D.A. 656-57). The next day, Connelly testified, Kovens telephoned him and "stated again that he was hopeful no physical harm would come to me, that these boys play rough and he hoped I could get the funds." (D.A. 657-58). Kovens did not testify at the trial.

testified at trial, *Bruton* is inapplicable because Dranow was subject to cross-examination by the other petitioners. In this respect, however, the government has ignored the conflict of the Seventh Circuit's decision below with its prior decision in *United States v. Guajardo-Melendez*, 401 F.2d 35, where a conviction was reversed under the *Bruton* authority, notwithstanding the fact that the declarant co-defendant had testified at trial. Nor do we comprehend the government's argument with regard to our reliance on *Bujese v. United States*, 392 U. S. 297. Since the co-defendant in that case testified at trial, and since this Court remanded the case for consideration in light of *Bruton*, it is manifest that the fact that the co-defendant testified did not preclude application of *Bruton's* teaching.

This case presents for determination the question of the applicability of the principles of *Bruton* to a situation where a co-defendant's confession, grievously prejudicial to the other defendants, is submitted for the jury's consideration, and then because of the inherent prejudice of the confession, the trial court instructs the jury to disregard the confession. Can it be reasonably contended under *Bruton* that if a cautionary instruction cannot remove the taint of an admission of a co-defendant, the same cautionary instruction can erase from the minds of the jury prejudicial and highly inflammatory confessions which are later excluded from evidence? As this court has stated, "The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction." *Krulewitch v. United States*, 336 U. S. 440, 453. Resolution of this important issue warrants the grant of the writ in this case.

VIII. OTHER ISSUES PRESENTED

Respondent has seen fit not to reply to any of the other issues raised in our petition for certiorari, but has chosen to rely on its arguments made in its Brief in Opposition to the prior petition for certiorari, No. 1003, O.T. 1966. Respondent has thereby failed to meet additional reasons submitted here for granting the writ. It is therefore pertinent to note the following:

1. Though answering the separate petition filed by Benjamin Dranow, No. 911, O.T. 1968, respondent has made no mention of these petitioners' contention that the obvious irrationality of Dranow at trial required the grant of a severance to them. Further, the government previously argued that no error arose from the failure of the Court to hold a hearing as to Dranow's mental competency under 18 U. S. C. 4244 because Dranow's lawyers failed to submit reports of psychiatrists as to his condition (Br. in Opp. 59). But, independently of what Dranow's counsel did or failed to do in order to obtain a hearing to determine his mental competency, these petitioners were entitled to have the *trial Court* act under the statute to protect *their* rights in the joint trial with their co-defendant. This issue thus presents a first opportunity to declare what are the rights of co-defendants to obtain a hearing of the mental competency of an obviously irrational co-defendant.

2. In connection with the trial court's failure to grant a hearing with regard to the defense allegation that prejudicial newspaper articles reached the sequestered jury, the government has not responded to our assertion of the conflict of the decision below with the recent de-

cision of the 10th Circuit in *Mares v. United States*, 383 F.2d 805. In *Mares*, it was held that the trial court's failure to hold an inquiry as to whether the jurors had been exposed to a prejudicial article required the granting of a new trial. Here the trial court refused to conduct such an inquiry (D.A. 2215), and the resulting conflict of decisions can be resolved only by action of this Court.

3. The trial judge had communicated with the deliberating jury in the absence of petitioners and their counsel. The Court below found in its original decision (App. A., pp. 25-28) that the trial judge's communication was "not good practice," but that "the procedure now complained of was not prejudicial and does not warrant a reversal of defendants' convictions" (App. A, p. 28). The dissent concluded that "the error was of constitutional proportions" (App. A, p. 45). Following that decision, this Court decided *Chapman v. California*, 386 U. S. 18, 24, holding "that before a federal constitutional error can be held harmless, the Court must be able to declare a belief that it was harmless beyond a reasonable doubt." Clearly, the Court below did not apply the *Chapman* test and thus its decision is in conflict with that holding of this Court. Respondent has not seen fit to comment on this conflict.

CONCLUSION

For all of the reasons advanced, the petition should be granted.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 271

CASSIUS MARSELLUS CLAY, JR.,
a/k/a MUHAMMAD ALI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

Since the brief in opposition was filed in this case, information has been received relating to electronic surveillance involving the petitioner. Accordingly, this memorandum is filed in order to make appropriate disclosure to the Court.

1. Although petitioner was not at any time the subject of electronic surveillance directed against him, on five occasions he did participate in conversations which were monitored at three places where surveil-

lance directed against others was being conducted. In one instance, the overhearing occurred in the course of the gathering of foreign intelligence information. In all instances, the surveillance was well before the time of the facts involved in this case. The overhearings of petitioner occurred in March, September and October of 1964 and in April and June of 1965. The petitioner's refusal to submit to induction, for which he was convicted, took place on April 28, 1967.[1]

2. We recognize that, as a general rule, once the government has admitted that a defendant's conversations have been overheard, the proper procedure is for the Court to remand the case to the district court for a hearing to determine whether the prosecution used any leads or evidence obtained from the overhearing of those conversations. We submit, however, that this case presents a peculiar fact situation in which this Court can determine by an examination of the record that the overhearing of petitioner's conversations could not possibly have had any effect on the prosecution.

Petitioner was indicted and convicted for failing to submit to induction, an act which took place in the presence of officers of the United States Armed Forces and which petitioner both predicted and reported to the public press. At the trial, the government called only four witnesses; three of them testified about petitioner's arrival at the induction center and his re-

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[1] Petitioner's claim that he was a conscientious objector was not made until February 1966 and he did not assert a claim of ministerial exemption until August 1966.

fusal to submit to induction and the fourth merely identified petitioner's Selective Service file, which was then introduced into evidence. Thus, it is clear that nothing obtained by overhearing petitioner's conversations was used to convict petitioner; the evidence against him came only from those who in the normal course of their duties were present when petitioner publicly refused to submit to induction.

Moreover, an examination of the Selective Service file, which is part of the record before the Court, conclusively establishes that the denials of petitioner's claims for conscientious objector and ministerial classification were not predicated on information obtained as a result of overhearing any of petitioner's conversations. The evidence that petitioner was not entitled to such exemptions came from an examination of the tenets of his religion, as found in the published works of its leaders, and from his own statements, which were contained in documents and testimony he submitted to support his claims and in published newspaper interviews (See Brief in Opposition in this case, pp. 6-10). While the Selective Service file does contain a summary of interviews conducted by the F.B.I. of some of petitioner's neighbors, friends, business associates and relatives, these people all spoke highly of petitioner and none of them provided any information that would have supported a denial of his claims.[2] Thus, even if it were assumed *arguendo* that

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[2] Only one person interviewed, a former high school teacher of petitioner, stated that he doubted the sincerity of petitioner's religious claims. But he gave no specific factual information to support this claim. Moreover, since petitioner's

the F.B.I. had learned the identity of these people only by overhearing petitioner's conversations, it is clear that none of them provided evidence against petitioner.[3]

3. In this situation, we submit that the overhearing of petitioner's conversations could not have produced any of the evidence used to convict him for violating the Selective Service law; and that, whatever may be the decisions in *Alderman* v. *United States*, No. 133, O.T., 1967, and *Ivanov* v. *United States*, No. 11, and *Butenko* v. *United States*, No. 197, this Term, there would be no occasion to remand this case to the district court for further proceedings to consider the effect of the overhearings upon petitioner's conviction. Should the Court disagree with us, however, it would then be appropriate to defer action on the present petition until those cases are decided.

4. The question may well be asked why this surveillance was not discovered at an earlier date. The answer is simply that it is not the practice to check for the possibility of such surveillance in this type of

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high school record was checked and other teachers were interviewed, it is clear that this interview resulted from normal procedures in such cases and that this individual's identity was not learned by overhearing petitioner's conversation.

[3] While the report also sets forth information from a confidential source that the male members of petitioner's religion are given military instruction, petitioner and another witness both testified at the hearing on his claim of exemption that this was only training in self-defense and that there was no thought of actually engaging in any type of war. This testimony was never questioned.

Selective Service case, because the refusal to submit to induction is a public act and there would be no reason to use electronic surveillance to obtain proof of that act.

In this case, the facts relating to the refusal to submit to induction were reported by the Selective Service Board to the United States Attorney in Houston, who instituted prosecution on those facts. When the petition for certiorari was filed, the matter initially was handled by the Appellate Section of the Criminal Division in the Department of Justice, which instituted a check for possible electronic surveillance. The response to this inquiry did not arrive until after the brief in opposition had become due. Shortly thereafter, however, the information was received and disclosure is accordingly made in this memorandum.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

AUGUST 1968.

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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 317

AMERICO DI PIETTO, ERNEST INFELICE, JAMES MIRRO, FRANK SANTUCCI, and ROBERT J. MCDONNELL, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

Following the filing of the brief in opposition to the petition for a writ of certiorari, information has come to our attention regarding prior unlawful electronic surveillance of petitioners Mirro and McDonnell by federal agents. Each of them was separately overheard discussing matters unrelated to this case on a single occasion (in June and December 1964 respectively), long after the events in 1961 giving rise to the

prosecution. We intend to make a disclosure to the district court in accordance with the procedure which this Court prescribes in *Alderman* v. *United States*, No. 133, this Term, pending on the government's motion to modify. In view of the irrelevancy of the overheard conversations, we suggest that it would be appropriate for the Court to rule on the petition in respect of the questions which it presents. See, *e.g.*, briefs for the government in opposition in *Scandifia* v. *United States*, No. 54, this Term, and *Franzese* v. *United States*, No. 84, this Term. A denial of the petition would be without prejudice to further proceedings in accordance with this Court's decision in *Alderman* v. *United States*, *supra*.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

SEPTEMBER 1968.

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SUPREME COURT, U. S.

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No. 317

In the Supreme Court of the United States

OCTOBER TERM, 1968

AMERICO DI PIETTO, ERNEST INFELICE, JAMES MIRRO, FRANK SANTUCCI and ROBERT J. McDONNELL,
Petitioners,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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REPLY TO SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 317

AMERICO DI PIETTO, ERNEST INFELICE, JAMES MIRRO, FRANK SANTUCCI and ROBERT J. McDONNELL,
Petitioners,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY TO SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

On Saturday, September 28, 1968, the Petitioners received a copy of the Supplemental Memorandum for the United States. The Memorandum admits to "unlawful electronic surveillance" of Petitioners Mirro and McDonnell by Federal Agents, asserting that the overheard conversations were "unrelated" to the case at bar. Nevertheless, the Solicitor General asks that this Court rule on the

Petition for a Writ of Certiorari to the Seventh Circuit in respect of the questions which it presents, without prejudice to a proceeding before the District Court in accordance with the procedure prescribed in *Alderman* v. *United States,* No. 133.

The Solicitor states that he intends to make a disclosure to the district court in accordance with the procedure which this Court prescribes in *Alderman* v. *United States,* No. 133, this Term. This action by the Solicitor is, of course, dependent on the success of his motion to modify. In the instant case, the Solicitor has again made an *ex parte* determination of the relevancy of the overhead conversations. In *Alderman,* this Court stated:

> "We read the response as admitting that Alderisio's conversations were overheard by unlawful electronic eavesdropping but as justifying nondisclosure on the basis of the Department's determination that the information obtained was not arguably relevant to this prosecution. We cannot accept the Department's ex parte determination of relevancy in lieu of such determination in an adversary proceeding in the District Court. Accordingly we grant the petition for certiorari as to each of the petitioners Alderisio and Alderman, vacate the judgment of the Court of Appeals, and remand the case to the District Court for a hearing, findings, and conclusions on the nature and relevance of these convictions of any conversations . . . ."

The procedure suggested by the Solicitor, *i.e.,* denial of the petition for certiorari and subsequent disclosure to the district court is completely contrary to the well-established procedure of this Court. See *Black* v. *United States,* 385 U.S. 26, *Hoffa* v. *United States,* 387 U.S. 231, *O'Brien* v. *United States,* 386 U.S. 345, *Schipani* v. *United States,* 385 U.S. 372, and *Granello* v. *United States,* 386 U.S. 345.

The Solicitor suggests in his Memorandum for *Scandifia* v. *United States,* No. 54, this Term, that the district court would have jurisdiction to hear this matter without granting of the petition for certiorari and remand for hearing on the theory that the illegal electronic eavesdropping is "newly discovered evidence." We submit that a contrary conclusion is inescapable. This is not evidence that is newly discovered but is evidence "newly divulged" by the Solicitor, which, we submit, the Department of Justice was under a continuing duty to divulge at all stages of this prosecution. See *Brady* v. *Maryland,* 373 U.S. 83.

The indictment was returned on December 8, 1965, and related to matters which allegedly occurred on May 25, 1961. The period of electronic surveillance suggested by the Solicitor General in 1964 was a critical period when the investigation in this matter was apparently under way; it certainly had not been concluded.

The Supplemental Memorandum, however, states that "each of them was separately overheard discussing matters unrelated to this case, etc." Quite aside from the unilateral determination of "unrelated", the Petitioners wish to bring to the Court's attention matters which have recently arisen in the United States District Court for the Northern District of Illinois.

In two cases, *United States* v. *Fidanzi,* No. 67 CR 561 and *Angelini* v. *Illinois Bell Telephone Co.,* No. 68 C 612, it was revealed that the Federal Bureau of Investigation maintains what are called "index cards". In the course of electronic surveillance in Chicago, Illinois, it appears that every time a person's name is mentioned in any electronic surveillance, an index card is prepared for that particular individual. Even if he is not a participant in a conversation, when other persons discuss his activities, the particular tape, record or log and the date thereof is

registered on the "index card". For example, in the case of Donald Angelini, the F.B.I. admitted to five entries on the index card in which Angelini was either overheard *or* discussed. It was further admitted that these cards involved three separate and distinct places where electronic surveillances were being conducted.

In *United States* v. *Fidanzi,* four logs were produced, in one of which Fidanzi was a participant in the overheard conversations, and in three of which he was the subject of conversations between other persons. Interestingly enough, all four conversations were the result of electronic surveillance (by trespass) in an office where, apparently, the surveillance was aimed at Phil Alderisio, who is a Petitioner in a matter now pending before this Court, in *Alderisio* v. *United States,* No. 133.[1]

These Petitioners respectfully urge this Court to remand this case back to the District Court for a full inquiry into the extent, not only of the direct electronic surveillance in which the Petitioners Mirro and McDonnell were participants, where their actual conversations were overheard, but also to determine whether or not any "leads" or any investigation information relative to this case were gained through the conversations of *other* persons discussing the affairs of the Petitioners Mirro and McDonnell. Indirect eavesdropping can be just as violative as direct.

In the light of the government's admission here, Petitioners express an additional concern. In the testimony of F.B.I. Agent Robert E. Malone in *United States* v. *Fidanzi,*

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[1] The trial court in *Fidanzi* refused to make an *in camera* inspection pending this Court's decision in *Kolod* v. *United States,* No. 133. The Government then produced logs for defense inspection, under a protective order barring defense counsel (over objection) from revealing the contents of the logs of eavesdropping of Alderisio and Fidanzi, and Alderisio and others concerning activities of Fidanzi. *Fidanzi* is presently on appeal.

Malone stated that not all of the logs were forwarded to Washington, D.C. The eleventh hour admissions of the Respondent of violations of Federal law, bespeaks a failure of communication between local officers of the Federal Bureau of Investigation and its national office. It is the Petitioners' respectful submission that only an adversary inquiry in the particular district where the offenses by a federal agency occurred will satisfy the question of whether or not all material thus unlawfully obtained is being made available to Petitioners or persons aggrieved as a result of electronic eavesdropping.

The Petitioners therefore, respectfully pray that this Court remand this cause to the District Court for full hearings on the nature and extent of the electronic surveillance.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 271

CASSIUS MARSELLUS CLAY, JR., also known as MUHAMMAD ALI, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

MOTION FOR LEAVE TO AMEND PETITION FOR WRIT OF CERTIORARI OR IN THE ALTERNATIVE MOTION FOR LEAVE TO FILE A SUPPLEMENTAL BRIEF

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IN THE

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v.

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MOTION FOR LEAVE TO AMEND PETITION FOR WRIT OF CERTIORARI, OR IN THE ALTERNATIVE, MOTION FOR LEAVE TO FILE A SUPPLEMENTAL BRIEF

Petitioner moves the Court to allow him to amend his petition for writ of certiorari by adding and including the following at the end of p. 21 thereof; or, in the alternative, for leave to file the following as a supplemental brief to his pending petition for writ of certiorari pursuant to rule 24(5), *Rules of The Supreme Court of the United States:*[1]

[1] "Any party may file a supplemental brief at any time while a petition for a writ of certiorari is pending calling attention to new cases or legislation or other intervening matter not available at the time of his last filing."

1. The Court of Appeals for the Fifth Circuit, since filing of the petition for writ of certiorari herein, decided *Sellers* v. *McNamara,* 1 S.S.L.R. 3155 (No. 24654, 5th Cir. July 23, 1968); a copy of the opinion therein is attached hereto as an appendix at pp. 1a-5a.

In a separate opinion (in effect, a dissent) from that opinion which held that the appellant, Sellers, was not entitled to relief from the systematic exclusion of Negroes from his selective service boards, Judge Tuttle said: "[T]he statute and the Constitution of the United States do forbid the practice which produces selective service boards of an entire state whose members are substantially all white, while classifying and ordering into service citizens of the state, approximately one third of whom are Negroes." (4a)

Judge Tuttle, while acknowledging that the law of the Fifth Circuit had been established in *Clay* concerning the de facto acts of draft boards, suggested that the *Clay* rationale is not necessarily the law of the United States: "[I]f this decision is wrong it is subject to review by the Supreme Court." (3a)

Judge Tuttle then proceeded to distinguish *Sellers* on procedural grounds, pointing out that the racial composition of draft boards was subject to direct attack. Petitioner Clay challenged, as did Sellers, the racial composition of his selective service boards by direct attack prior to induction. *Muhammad Ali* v. *Breathitt,* 268 F. Supp. 63 (W.D. Ky.), *stay of induction and writ of mandamus denied,* No. 17,787 (6th Cir., Apr. 17, 1967), *stay, injunction, and mandamus denied,* 386 U.S. 1002, *cert. denied,* 386 U.S. 1018, *reh. denied,* 386 U.S. 1027 (1967); *Muhammad Ali* v. *Connally,* 266 F. Supp. 345 (S.D. Tex. 1967), *stay and injunction*

denied, No. 24,714 (5th Cir., May 11, 1967). Then he sought to enjoin prosecution. *Muhammad Ali* v. *Connally,* Civ. No. 67-H-333 (S.D. Tex., May 1, 1967), *stay and injunction denied,* No. 24,723 (5th Cir., May 1, 1967 and May 11, 1967). Then, after indictment, a writ of prohibition was unsuccessfully sought. *Muhammad Ali* v. *Connally,* No. 24,750 (5th Cir., May 15, 1967). See the opinion of the court of appeals at 7a-11a, appendix to original petition herein.

Further, note 1 of the separate opinion necessarily constitutes a recording of Judge Tuttle's dissent from the court of appeals' decision in *Clay.*[2]

Also see Mr. Justice Black's opinion ordering Sellers' release on bail pending appeal of his criminal conviction: "I am unable to say that a challenge to draft boards of this kind would be dismissed by this court as frivolous." *Sellers* v. *United States,* 37 U.S.L.W. 2117 (Black, Circuit Justice, August 17, 1968).

Should the court find that petitioner has a right not to be drafted by a board from which Negroes have been systematically excluded, his conviction for failure to obey the order of induction should be reversed. In the alternative, if this court finds that a civil injunction against induction to be proper remedy for the enforcement of petitioner's right, then this court should order a reversal of petitioner's conviction since his remedy

---

[2] The footnote reads in full:

> This results from the fact that the petition by Clay for a rehearing of his appeal en banc was denied by the court under the provisions of 28 U.S.C.A. § 46(c) following my retirement, and I was not a member of the court who was eligible to vote for en banc rehearing or note my dissent from the court's denial of the petition. (3a)

was denied him by the courts below and by denial in this Court of a stay of petitioner's induction. See *Muhammad Ali* v. *Gordon*, 386 U.S. 1002 (1967).

Additional cases presently pending decision here or in other courts which involve the question of systematic exclusion of Negroes from the Selective Service System are: *Sellers* v. *McNamara, supra*, (petition for certiorari filed contemporaneously herewith); *Nelloms* v. *United States, petition for cert. filed*, Misc. No. 781, Aug. 30, 1968; *Sumrall* v. *United States, petition for cert. filed*, Aug. 19, 1968; *United States* v. *Brooks, appeal docketed* 6th Cir., May 9, 1968. See also the petition for certiorari herein at 8 n. 4.

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 24654

CLEVELAND L. SELLERS, JR., *Appellant,*

v.

ROBERT MCNAMARA, ETC., ET AL., *Appellees.*

Appeal from the United States District Court for the Northern District of Georgia

(July 23, 1968)

Before TUTTLE, BELL and SIMPSON, *Circuit Judges.*

PER CURIAM: There are now pending before this panel of the court two matters relating to efforts made by the appellant to avoid induction into the armed services of the United States, and, in the alternative, to cause his release from his present incarceration under a conviction following a trial subsequent to a denial by this court of a stay of prosecution.

Since this case was submitted on oral argument, two facts have occurred which requires us to deny the relief sought both on the merits of the appeal from the order denying the injunction against his induction, and by his application for a stay of that denial, which, in effect, would amount to an order requiring that he be discharged from his present service of sentence following his conviction. These two facts are, (1) Sellers' trial, which resulted in his conviction, followed by his sentence to the custody of the Attorney General, followed further by a denial of bond pending appeal. The second is the decision by this court in

the appeal of Cassius Marsellus Clay, Jr., a/k/a Muhammad Ali v. United States of America, No. 24,991, 5 Cir., May 6, 1968, —— F. 2d ——.

There is a further fact, of more than ordinary judicial significance; Clay's motion for reconsideration of the decision of this court in his appeal by the court sitting en banc, has also been denied.[1]

The principal argument made by Sellers on the merits of his appeal in this case have now been answered contrary to his contentions by the opinion of the court in the Clay case. These contentions will be more particularly discussed in a separate opinion filed by Judge Tuttle, a member of ths court. Not only the rule of stare decisis, but the further weight that must be accorded a decision of the court as to which a petition for rehearing en banc has been denied, completely controls the disposition of this case on the merits. It also, perforce, concludes the issue now raised before us in the nature of a motion that this case also be heard by the entire court, sitting en banc.

The judgment of the trial court denying the temporary injunction against the prosecution of appellant Sellers, or his release if inducted pending a final disposition of the case, is AFFIRMED.

The motion for consideration of this case by the court en banc is DENIED. No member of this panel nor judge in regular active service on the court having requested that the court be polled on rehearing en banc, Rule 25(a), subparagraph (b), the petition for rehearing en banc is DENIED.

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[1] The Federal statute provides that upon the request of any active member of the court, the chief judge shall poll the court to ascertain whether a majority of the judges on active service vote in favor of a hearing or rehearing of a case en banc. 28 U.S.C.A. 46(c).

TUTTLE, Circuit Judge, SEPARATE OPINION:

I, of course, agree with what is stated in the opinion of the court to the effect that the law of this circuit has now been established in the Clay case that neither the federal constitution nor the Selective Service Act deprives a local draft board of the power to perform all of the services required of it under the Act by reason of the fact that, although as many as one third of the draft eligible persons dealt with are Negroes, the boards themselves are all white, or with a token number of Negro members.

I recognize, of course, that if this decision is wrong it is subject to review by the Supreme Court. Therefore, I would not normally write a separate opinion if it were not for the unusual procedural status of the case that has made it impossible for me to note my dissent in the normal way.[1]

Much of what troubles me is the difference in stance between the Clay case and the Sellers case, and the possibility that a basis of relief may be lost to appellant because of this difference. Briefly stated, this difference rises from (1) the fact that this is a direct attack brought by Sellers against those responsible for naming the draft boards, alleging that the boards are illegally constituted, and seeking to enjoin their functioning as to him, whereas (2) the Clay case came before our court as an appeal from a conviction in a criminal trial. This poses the question whether the alleged lack of jurisdiction of an "illegally" appointed board can be urged as a defense to a criminal prosecution, or whether the acts of such a board, ostensibly appointed and functioning under the statute, are valid as of a de facto tribunal when its decisions are brought in issues only by collateral attack.

---

[1] This results from the fact that the petition by Clay for a rehearing of his appeal en banc was denied by the court under the provisions of 28 U.S.C.A. § 46(c) following my retirement, and I was not a member of the court who was eligible to vote for en banc rehearing or note my dissent from the court's denial of the petition.

In the Clay case, this court dealt with the attack on the jurisdiction of the allegedly illegal constituted draft boards on the merits, and thus treated the matter as one appropriate for consideration by a trial court as a defense to the criminal prosecution. However, in the case of Raymond Joseph DuVernay, —— F. 2d ——, (5 Cir.) [No. 24132, February 7, 1968], as I read it, even though expressed only in a footnote, it seems that this court held that the only way in which such a person as appellant can challenge the racial composition of the board is by *direct* attack; that the attack may not be made after the draftee is indicted for failure to be inducted. See footnote 6, DuVernay v. United States, supra.

If it should be determined by the Supreme Court that the attack upon the racial composition of the draft board may *not* be made as a defense to a prosecution, but can only be raised by a direct attack, then Sellers will have lost his opportunity to urge his defense on the merits, unless in this, the Sellers case, the point is adequately preserved for appeal.

I feel it appropriate, therefore, to express my separate view that had our court not foreclosed the matter for our consideration, I would conclude that the issue is one which should be raised by direct attack, and that the statute and the Constitution of the United States do forbid the practice which produces selective service boards of an entire state whose members are substantially all white, while classifying and ordering into service citizens of the state, approximately one third of whom are Negroes.[2]

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[2] The statutory language which I think prohibits the appointment of such racially limited boards is that which requires that "... in the interpretation and *execution* of the provisions of this title [including the appointing of board members] ... there shall be no discrimination against any person on account of race or color ..." 50 U.S.C.A. App. 455(a). (Emphasis added.)

In light of the Supreme Court's policy of not, at all times and under all circumstances, requiring immediate forthwith complete vindiction as to each person of his constitutional rights, see Brown v. Board of Education of Topeka, Kansas, 349 U.S. 294, and the legislative reapportionment decisions of the Supreme Court,[3] I would have held the board to have been illegally constituted and would have favored remanding the case to the trial court to make the initial determination as to what relief should be granted to a person who had brought the direct attack on the composition of the boards as did this appellant.

[3] Although the court in the Clay opinion says ". . . a draft board system which does not have a sufficiently representative number of Negro members is comparable to malapportioned legislature," the court does not seem to recognize that unless such malapportionment is of constitutional dimensions the courts are powerless to act; but when they *do* act they require *re*apportionment, even though not invalidating acts performed in the meantime.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. [redacted] 271

CASSIUS MARSELLUS CLAY, JR., also known as MUHAMMAD ALI, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITIONER'S REPLY TO SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 217

CASSIUS MARSELLUS CLAY, JR., also known as MUHAMMAD ALI, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITIONER'S REPLY TO SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

The Solicitor General, after the filing of the brief for the United States in opposition to the granting of the Petition for Certiorari, filed a Supplemental Memorandum disclosing for the first time that on five occasions petitioner participated in conversations which were monitored by electronic surveillance. The following, however, was not disclosed:

(a) The persons participating in the conversations;

(b) The dates and times (except for the months and years) of the conversations;

(c) The places of the surveillance;

(d) The duration of the surveillance;

(e) The persons or agencies conducting the surveillance;

(f) The persons or agencies who had access to the information obtained by the surveillance;

(g) The purpose of the surveillance;[1]

(h) The uses to which the information was put; and

(i) The substance of the contents, the recordings made, and the texts of any surveillance logs or memoranda.

Petitioner accordingly seeks disclosure of all of the foregoing,[2] prior to determining whether or not to move for a remand and hearing.

The Solicitor General recognizes that normally the proper procedure would be to remand the case to the District Court for further proceedings but asks that this course not be followed because "this case presents a peculiar fact situation . . . ." Supplemental Memorandum 2. The assertion that this Court can determine by an examination of the record alone that "petitioner's

[1] Except that in one instance "the overhearing occurred in the course of the gathering of foreign intelligence information." Supplemental Memorandum 2. See Brief for Petitioners in Ivanov v. United States, October Term 1968 No. 11.

[2] *Cf.* Hoffa v. United States, 387 U.S. 231, 232 (1967) which indicates that the Solicitor General's sua sponte disclosure is normally more complete; *e.g.*, there he at least listed the exact date of one conversation, the persons involved, the federal agency involved, the date of installation of the surveillance device, the subject of the conversation, and the extent of availability of the information to the prosecution.

conversations could not possibly have had any effect on the prosecution," *id.*, cannot be accepted; but petitioner does agree that "a peculiar fact situation" exists which may require determination by this Court rather than a remand. Before these proceedings petitioner's income was derived from boxing. When indicted for failure to submit to induction he was stripped of his heavyweight title which deprived him of this means of livelihood. The athlete has but a few years during which his earning capacity is viable; the permanent effect and injury to property rights, to the very ability to earn a living, caused by these criminal proceedings is more crucial than that suffered by most persons. See opinion below, Appendix to Petition for Certiorari 35a n. 13. To remand the case to the District Court and perhaps again have it wend its way through the appeals process could effect by lapse of time an irreparable injury to petitioner.

Accordingly, petitioner prays that full disclosure be made in this Court. Petitioner's counsel cannot now determine whether to seek a disposition of the matter here, as suggested by the Solicitor General, or to seek a remand for a factual hearing.

Otherwise further disclosures may come from the Government piecemeal, further delaying a final adjudication of petitioner's rights. For example, on the remand of *Hoffa* v. *United States, supra,* 3 Cr. L. 2457 (No. 16,634, 7th Cir., Aug. 15, 1968) eavesdropping upon the attorneys was not disclosed until oral argument in the court of appeals. And in *Kolod* v. *United States,* 390 U.S. 136 (1968), *vacating and remanding* 371 F. 2d 983 (10th Cir. 1967) the Tenth Circuit's opinion shows that the fruits of electronic surveillance

had been at issue at the trial; then prior to appellate argument "counsel for the government advised this court that he had learned for the first time of the existence of additional files . . .", 371 F. 2d at 988, and a limited remand was ordered. Then, as shown by the opinion of this Court on rehearing, the defendants' counsel learned after the petition for certiorari was filed that still more electronic surveillance had taken place, necessitating yet another round of hearings (except for defendant Kolod, who by then had died).

The record in this case presumptively establishes the relevance of the information gained by the electronic surveillance.

First, the primary thrust of the Solicitor General's assertion of irrelevance is a recital of facts that show that petitioner was in fact entitled to be classified as a conscientious objector. This merely strengthens the suspicion (heightened by the abnormally limited nature of the disclosure) that there may have been something else that caused the Department of Justice or the various elements of the Selective Service System to refuse to grant him this classification.[3]

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[3] The Supplemental Memorandum pays lip service to, but effectively denies, the principle that, at the very least, an *in camera* judicial inspection of the fruits of the surveillance is essential to due process; here there is in fact that "*ex parte* determination of relevancy" found unacceptable in Kolod v. United States, *supra*, 88 S. Ct. at 753. That even *in camera* inspection is insufficient, particularly where, as here, considerations of national security are not asserted, see Baker v. United States, 3 Cr. L. 2460 (No. 21,154 D.C. Cir., Aug. 9, 1968): "[T]he Court's *in camera* examination of the logs, however diligent and careful, was hardly an adequate substitute, in these circumstances, for an adversary proceeding." *Id.*, slip opinion at 45.

Page 3 of the Supplemental Memorandum may give a clue as to the nature of the information produced by the surveillance: "The evidence that petitioner was not entitled to such exemptions came from examination of the tenets of his religion, as found in the published works of its leaders, and from his own statements . . . ." The source of this "evidence"[4] may perhaps more accurately be said to be the Department of Justice's advice to the Selective Service System that "the teachings of the Nation of Islam, rest on grounds which primarily are political and racial. These constitute objections to only certain types of war in certain circumstances, rather than a general scruple against participation in war in any form." Petitioner's Selective Service File 220 (Govt. Exh. 1; see Petition for Certiorari 16-17). The genesis of this assertion may well have been the surveillance, perhaps the conversation "overheard in the course of the gathering of foreign intelligence information." Supplemental Memorandum 2. Since the surveillance was "directed against others," *Id.*, this sort of information would not necessarily have come from petitioner's conversations. Accordingly any disclosure order should require the production not only of the records of petitioner's over-

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[4] Except for the mass of newspaper clippings in defendant's selective service file, the only "published work" referred to by the court of appeals to show "the tenets of his religion" is the opinion in Sostre v. McGinnes, 334 F. 2d 906, 909 (2d Cir.) *cert. denied*, 375 U.S. 892 (1964). See Appendix to the Petition for Certiorari 35a-40a. Published works are contained in the Record. Parenthetically it should be noted that, while the lengthy quotation, *Id.* at 37a-38a, from that case might, if true (Sostre was of course not a matter of evidence herein), have been offensive to the court, there is nothing in it on which to base the denial of petitioner's claimed conscientious objection.

heard conversations, but also those of the leaders of the Lost Found Nation of Islam and "others"; this should be well within the purview of Fed. R. Cr. P. 16(b).

Third, the Supplemental Memorandum, as does the Solicitor General's Brief in Opposition, ignores petitioner's extensive efforts to secure pre-trial discovery under the liberalized Federal Rule of Criminal Procedure 16(b). Here too is additional ground for keeping the matter before this court at least until full disclosure has been made; the district court, as affirmed by the court of appeals, steadfastly frustrated petitioner's every effort to discover materials having a bearing on the Selective Service System's denial to petitioner of I-O and IV-D classifications. See Petition for Certiorari 3 (Questions Presented numbered 2c and 4), 9, 14-15, and Appendix thereto 24a-28a. Since the District Court and Court of Appeals agreed that discovery could produce nothing of relevance, a simple remand leaving the determination of relevance to the district court would be of doubtful value to petitioner until the case again reaches this Court and is perhaps again remanded, practically abolishing the remainder of petitioner's economically productive life.

CONCLUSION

Petitioner respectfully requests that the Solicitor General be required to make full disclosure of all matters involved herein (a) prior to requiring petitioner to make a determination as to whether or not to move for a remand herein, and (b) prior to remand by this Court *ex mero motu.*

Respectfully submitted,

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SECOND MOTION FOR LEAVE TO AMEND PETITION FOR WRIT OF CERTIORARI, OR IN THE ALTERNATIVE, MOTION FOR LEAVE TO FILE A SUPPLEMENTAL BRIEF

Petitioner moves the court to allow him to amend his petition for writ of certiorari by adding and including the following therein; or, in the alternative, for leave to file the following as a supplemental brief

to his pending petition for writ of certiorari pursuant to Rule 24(5) of the *Rules of the Supreme Court of the United States,* in order to call attention to a new case decided since the filing of the last pleading herein:

The questions presented in the original petition read in part:

> 1. . . . [W]hether the Court of Appeals erred in:
>
> . . .
>
> d. Failing to find that petitioner had proved specific acts of racial prejudice directed against him
>
> . . . .
>
> 2. Whether petitioner was denied constitutional due process and fairness and justice required in selective service proceedings by statute and regulations in that:
>
> . . .
>
> b. his selective service file contained "no basis in fact" for the denial to him of a ministerial exemption;
>
> c. he was wrongfully denied conscientious objector status due to: mistaken advice from the Department of Justice to the Appeal Board for the Western District of Kentucky (the "Kentucky Appeal Board"); the failure of the Texas Appeal Board to refer his case for advice to the Department of Justice; and the denial to him and the Kentucky Appeal Board of copies of the Hearing Officer's report to the Department of Justice. Petition for Certiorari at 2-3.

Fairly comprised within the foregoing is the question presented in the recently decided case of *Presbyterian*

Church in the United States v. *Mary Elizabeth Blue Hull Memorial Presbyterian Church,* 37 U.S.L.W. 4107 (U.S. No. 71, Jan. 27, 1969) which may be paraphrased as follows:

> The question presented is whether the restraints of the first amendment permit the United States Department of Justice to determine a selective service registrant's rights on the basis of the interpretation and significance the Department assigns to aspects of church doctrine.[1]

In the alternative petitioner prays that the foregoing be considered as an additional question under Rule 24(5).

As pointed out in the Petition for Certiorari at 16-17 and in Petitioner's Reply to Supplemental Memorandum for the United States at 5, the Department of Justice advised the Selective Service System that "the teachings of the Nation of Islam rest on grounds which primarily are political and racial." Petitioner's Selective Service File 220 (Govt. Exh. 1). Petitioner was thereupon denied classification as a minister or conscientious objector. In deciding the conscientious objection issue the court of appeals apparently relied in part on this finding (Appendix to Petition for Writ of Certiorari, 37a) and approved "a penetrating analy-

---

[1] The *Presbyterian Church* case stated the question:

> The question presented is whether the restraints of the First Amendment, as applied to the States through the Fourteenth Amendment, permit a civil court to award church property on the basis of the interpretation and significance the civil court assigns to aspects of church doctrine. 37 U.S.L.W. at 4107.

sis of the beliefs of the Black Muslims . . . ." (*Id.* at 37a n. 16; see also *id.* at 38a-40a nn. 17-18).

However in so doing the Department of Justice, and then the Court of Appeals for the Fifth Circuit, did exactly what was proscribed by *Presbyterian Church in the United States* v. *Mary Elizabeth Blue Hull Memorial Presbyterian Church,* 37 U.S.L.W. 4107 (1969). "In reaching such a decision . . ." the Department of Justice "must of necessity make its own interpretation of the meaning of church doctrines." 37 U.S.L.W. at 4109. Further it could have done this "only after assessing the relative significance to the religion of [its] tenets . . . ." *Id.* In fact the Department of Justice seems to have gone to "the very core of a religion . . ." *Id.,* and found that it departed from what its conception of a religion should be. This must clearly violate the establishment clause of the first amendment.

As shown by the decision in *Founding Church of Scientology* v. *United States,* 37 U.S.L.W. 2466 (D.C. Cir. Feb. 5, 1969), these principles are no less applicable when it is the government (rather than a dissident church faction) which asserts to the fact-finding body the relevance of church doctrine.

It was noted in the Petition for Certiorari at 16, 18 that the Department of Justice's action effectively

establishes a religion in violation of the first amendment.

Respectfully submitted,

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Of Counsel

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 271

CASSIUS MARSELLUS CLAY, JR., ALSO KNOWN AS MUHAMMAD ALI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN RESPONSE TO PETITIONER'S SECOND MOTION TO AMEND PETITION FOR CERTIORARI

Petitioner seeks to amend his petition for a writ of certiorari in order to comprehend a question relating to this Court's recent decision in *Presbyterian Church* v. *Hull Church,* No. 71, this Term, decided January 27, 1969, which he asserts is presented on the facts of the instant case. He appears to suggest that that decision bars any inquiry into the tenets or doctrine of a particular religious sect for the purpose of determining a Selective Service registrant's eligibility for a ministerial exemption under 50 U.S.C. App.

456(g), or conscientious objector status under 50 U.S.C. App. 456(j). It is unnecessary to reach that issue on the facts here presented.

As pointed out in our brief in opposition (pp. 6–7), petitioner's ministerial exemption claim was properly rejected since the record amply showed that his vocation was that of a professional boxer, and not a minister. Thus, in rejecting that claim there was no necessity to inquire into the tenets of the Black Muslim sect of which petitioner is a member, or to determine whether it qualifies as a *bona fide* "religion". Similarly, as to his conscientious objector claim, petitioner himself stated that he was not opposed to "participation in war in any form"—the statutory standard—but only to participation in certain wars (see Br. in Opp., pp. 8–9). Accordingly, an inquiry into the teachings of the Black Muslims was not an essential predicate to the denial of his claim to conscientious objector status either. There is therefore no occasion here to determine what relevance, if any, the holding in *Presbyterian Church* might have in the Selective Service context.

For the reasons stated, petitioner's motion should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

FEBRUARY 1969.

U.S. GOVERNMENT PRINTING OFFICE: 1969

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 271

CASSIUS MARSELLUS CLAY, JR., A/K/A MUHAMMAD ALI,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ADDITIONAL MEMORANDUM FOR THE UNITED STATES

This additional memorandum is submitted on the question of the effect of this Court's recent decision in *Alderman* v. *United States*, No. 133, O.T., 1967, decided March 10, 1969, on the disposition of this case.

In a Supplemental Memorandum for the United States which we filed in this case in August, 1968, we informed the court that on five occasions petitioner participated in conversations that were overheard during the course of electronic surveillances directed at others and that in one instance the surveillance was being maintained solely for the purpose of gathering foreign intelligence information. We urged, however,

336-441—69

that this case presented a peculiar fact situation where the record itself demonstrated that the overhearing of petitioner's conversations could not possibly have had any effect on the prosecution. We continue to adhere to that position and urge that, notwithstanding the Court's opinion in *Alderman,* certiorari should be denied in this case.

If the Court disagrees with our assessment of the record and believes that the case must be remanded to the district court for a hearing on the effect of electronic surveillance, we ask the Court to provide in its order that the government need not disclose to the defendant the log of the one surveillance which was being conducted to gather foreign intelligence information. We are submitting a copy of that log to the Court for its *in camera* examination.

In June, 1965, petitioner was overheard participating in one conversation which was monitored during the course of an electronic surveillance being conducted solely to gather foreign intelligence information. This surveillance had been specifically authorized by the Attorney General. On an examination of the log of that surveillance it is apparent from the nature of the premises involved that the purpose of the surveillance was to gather foreign intelligence information and that the government could not disclose, except to a court, where the surveillance occurred.

It is also clear from the log that the brief conversation overheard—which is recounted in a half page entry—had no conceivable relation to the prosecution of petitioner for refusing to submit to induction into the armed forces of the United States. The overhear-

ing occurred in June, 1965, and petitioner did not refuse to submit to induction until April 28, 1967. Petitioner did not claim to be a conscientious objector until February, 1966, and he did not assert a claim of ministerial exemption until August, 1966.

In these circumstances, where it is evident that the surveillance was directed solely at obtaining foreign intelligence information and where it can easily and quickly be determined that the overhearing of petitioner had no relation to his criminal conviction, we ask the Court not to require the government to either disclose the installation to petitioner or dismiss the prosecution, for, as is apparent from the nature of the premises involved, the government could not make such disclosure. See also Petition for Rehearing *Ivanov* v. *United States,* No. 11, this Term; Additional Memorandum for the United States, *Emmanual Blaz Mrkonjic-Ruzic* v. *United States,* No. 680, this Term.

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No. 317

In the Supreme Court of the United States

OCTOBER TERM, 1968

AMERICO DI PIETTO and ERNEST INFELICE, and FRANK SANTUCCI,

Petitioners,

vs.

UNITED STATES OF AMERICA,

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

PETITION FOR REHEARING OF THE ORDER DENYING CERTIORARI

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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 317

AMERICO DI PIETTO and ERNEST INFELICE, and FRANK SANTUCCI,

Petitioners,

vs.

UNITED STATES OF AMERICA,

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR REHEARING OF THE ORDER DENYING CERTIORARI

Now come the petitioners, Americo DiPietto, Ernest Infelice, by their attorney, Robert S. Bailey, and the petitioner Frank Santucci by his attorney, John Powers Crowley, pursuant to Supreme Court Rule 58 and petition for a rehearing of the order denying certiorari and as grounds therefor, state as follows:

1. On March 24, 1969, this Court granted certiorari as to the petitioners Mirro and McDonnell, vacated the judgments and remanded the cause to the District Court for further proceedings in conformity with *Alderman* v. *United*

States, Ivanov v. *United States* and *Butenko* v. *United States*, 37 L.W. 4189, and denied certiorari to these petitioners. *Giordano* v. *United States.*

2. In denying certiorari to these petitioners, the Court, in its *Per Curiam* order stated:

> We read the papers filed by the United States in these two cases as stating that the surveillance neither invaded the premises of the other petitioners nor overheard their conversations.

3. The Supplemental Memorandum filed by the Solicitor General admitting unlawful electronic surveillance of the petitioners Mirro and McDonnell made no mention of *the place of overhearing.*

4. Since no mention of the place or places of overhearing was made, it is impossible to determine from the Supplemental Memorandum whether the premises of the petitioners, or premises in which they had an interest, were invaded.

WHEREFORE, for the above reasons we respectfully request that this petition for rehearing be granted and that certiorari be granted, the judgments vacated and the entire case be remanded to the District Court to allow these petitioners an opportunity to establish an interest in the premises invaded.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

JOHN POWERS CROWLEY, a member of the Bar of this Court, and one of counsel for the petitioners certifies that this Petition for Rehearing is presented in the good faith and belief that this Court misinterpreted the papers submitted by the United States and further that the Petition is made for the above reason only and not for purposes of delay.

.....

JOHN POWERS CROWLEY

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968.

No. 546.

JAMES R. HOFFA, THOMAS EWING PARKS and LARRY CAMPBELL,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

MOTION TO SET ASIDE JUDGMENTS OF CONVICTION.

Come now the petitioners James R. Hoffa, Thomas Ewing Parks and Larry Campbell, and respectfully move this Court for an order setting aside the judgments of conviction rendered against them in the United States District Court for the Eastern District of Tennessee, Southern Division, on March 12, 1964, and for their reasons therefor state as follows:

1. Petitioners were indicted in the District Court in May, 1963, and judgments of conviction were rendered against them on March 12, 1964. Petitioner Hoffa was sentenced to a term of imprisonment for eight years, and petitioners Parks and Campbell, together with co-defendant King, were each sentenced to a term of imprisonment for three years (R. 121-124).[1] Their convictions were affirmed in this Court in December, 1966. Petitioners have been incarcerated under these judgments since March 7, 1967.

2. Since the return of the indictment, and on many subsequent occasions, petitioners have made repeated requests of the Government to disclose whether any conversations of the petitioners or of their counsel had been electronically overheard by Government agents. The Government replied to such requests by categorically denying that such electronic eavesdropping occurred or that it had in its possession records of such overheard conversations.

3. On October 21, 1968, in response to the petitioners' pending petition for certiorari, the Government for the first time revealed that it has in its possession records of an undisclosed number of conversations in which two of the petitioners participated and which were monitored by the Government during the course of electronic surveillance (Br. in Opp. 11).[2]

4. By reason of the Government's intentional suppression for over five years, and particularly during the nineteen months of petitioners' incarceration, of evidence so vitally material to the Constitutional validity of their

---

[1] "R." references are to the printed transcript of the record filed in this Court after the grant of certiorari by this Court in petitioners' original appeal (Nos. 32-35, O. T. 1966).

[2] "Br. in Opp." references are to the Government's Brief in Opposition to the instant petition for certiorari.

convictions, this Court should, in the exercise of its supervisory powers, as a deterrent to similar affronts to proper law enforcement, and to maintain the integrity and fairness of the due administration of law, set aside the judgments of conviction heretofore rendered in this cause.

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BRIEF IN SUPPORT OF PETITIONERS' MOTION TO SET ASIDE JUDGMENTS OF CONVICTION.

On October 21, 1968, the Government, for the first time in the lengthy history of this litigation, revealed that it has in its possession records of an undisclosed number of conversations in which two of the petitioners participated and which were monitored by the Government during the course of electronic surveillances (Br. in Opp. 11). The Government has chosen not to disclose to this Court the number of such monitored conversations, the date and place where such conversations occurred, the participants therein, or the content of such conversations.

Petitioners were indicted in May of 1963. Their convictions were affirmed by this Court in December, 1966. **Hoffa v. United States**, 385 U. S. 293 (1966). They have been incarcerated under the sentences imposed in this case since March 7, 1967. From the inception of this case, and on many subsequent occasions petitioners have sought in vain to determine from the Government whether any conversations of the petitioners had been electronically overheard by Government agents. Such requests have been met with repeated denials by the Government that such eavesdropping ever existed. Indeed, the Government has displayed a cavalier and far from candid approach in its representations to the Courts and to petitioners with regard to the existence and extent of its illegal electronic activities. For example, in the criminal case against petitioner Hoffa from which the instant charge of jury tampering arose, defense counsel sought the protection of the District Court against eavesdropping of counsel's conversations, and in response thereto Government counsel, a Special Assistant to the Attorney General, represented to the trial court that there had been no efforts to encroach on the privacy of petitioners or their counsel, and that said counsel had "never heard in that period of time of anyone at the Department of

Justice ever tapping any telephone lines . . . ." (App. 91a-93a).[3]

Further, after the indictment below and before trial, petitioners moved the District Court for an order permitting the inspection of all monitored conversations of the defendants, and all recorded conversations and statements of the defendants (R. 7-9). In its memorandum in opposition to such motion, the Government categorically stated that it had no "evidence obtained by wiretap or other illegal means, and no fruits of such evidence" (R. 13).

Additionally, during the trial of the cause below, the defense repeatedly suggested to the Court that they were being eavesdropped upon, and requested a hearing to determine the existence of such eavesdropping, and the Government's possession of the records of such eavesdropping (R. 61, 70, 71, 77, 78-81). Such motions were resisted by the Government, and the Government not only failed to disclose that it had such conversations in its possession, but indeed argued that the burden was on the defense to prove that eavesdropping had in fact occurred (R. 82-84).

On February 24, 1964, the defense moved to require the Government "to disclose specifically and unequivocally to the Court whether or not it has additional electronic recordings of any conversation involving the defendants" (R. 91) This motion was resisted by the Government (R. 92-94), and denied by the Court (R. 91). Indeed, one of the Government trial prosecutors said that to his knowledge there had "never been any wiretapping connected with this case at all . . ." (Appellants' Joint Appendix, **Hoffa v. United States**, U. S. C. A., 6 Cir., No. 15876-15879, p. 1025a). On another occasion said trial prosecutor stated to the trial Court:

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[3] "App." references are to the appendix filed in this Court with the instant petition for certiorari.

> "In any event, the government states emphatically, categorically, without any reservation, no phones are being tapped, no counsel is being surveilled, and no defendant is being surveilled by any agency of the federal government" (Memorandum for the United States in Opposition to Petitioners' "Motion for Relief," Nos. 32-35, O. T. 1966, p. 6).

While the original appeal of this cause was pending in this Court on certiorari, written requests were made by defense counsel of the Department of Justice to disclose the existence of electronic eavesdropping related to these petitioners. Such requests failed to produce the admission of the instant or any other electronic eavesdropping. After the affirmance of the convictions by this Court, petitioners filed herein a "Motion for Relief" based on Government electronic eavesdropping, and in response to such motion, the Solicitor General assured this Court that the allegations of eavesdropping were "totally without basis in fact" (Memorandum for the United States in Opposition to Petitioners' "Motion for Relief", Nos. 32-35, O. T. 1966, p. 7). This response of the Government, filed after the announcement of the Government's policy in **Schipani v. United States**, 385 U. S. 372 (1966), failed to reveal that the Government then had in its possession the monitored conversations of petitioners, now disclosed for the first time.

Further, in response to petitioners' motion for new trial which is the subject matter of the instant petition for a writ of certiorari, the Government filed numerous affidavits in the District Court denying the existence of electronic eavesdropping (App. 129a-171a). One of such affidavits, that of the Assistant Attorney General in charge of the Criminal Division, and who had "direct supervision" of the instant case, asserted that he had "no knowledge or information concerning any wiretap activities or

any illegal use of electronic devices" by the Government (App. 160a-161a).

The Government seeks now to excuse its earlier failure to reveal the existence of the monitored conversations on the grounds that this Court in **Kolod v. United States**, 390 U. S. 136 (1968), ruled for the first time that the Government must disclose all overhearings of a defendant's conversations, and cannot determine for itself whether such conversations are "arguably relevant" to the conviction. It is significant in this respect that **Kolod**, *supra*, was decided by this Court on January 29, 1968, and that almost nine months elapsed before the Government deigned to reveal that it does have illegally overheard conversations in its possession. In the interim, of course, the petitioners have remained imprisoned. No reference whatever was made by the Government to these conversations when the instant appeal was argued and submitted to the Court of Appeals on April 15, 1968, three months after the decision in **Kolod**. Query, whether the admission would ever have been made, had petitioners chosen not to file a petition for a writ of certiorari to review the Court of Appeals' judgment.

We submit that it is apparent from the foregoing that the Government has engaged in a consistent pattern of deception in this case in its attempt to conceal its eavesdropping activities from the Courts and from the petitioners. This pattern of deception is illustrated not only by the Government's conduct in this case, but also by the piecemeal and reticent disclosures of the Government's electronic eavesdropping generally in the past few years. It is plainly reflected in the Government's maneuvering to avoid disclosure of the full extent of its eavesdropping activities in another case involving petitioner Hoffa, to-wit, **Hoffa v. United States**, 387 U. S. 231 (1967), and in the proceedings following this Court's order therein. When that case was pending in this Court

on a petition for a writ of certiorari, the Government admitted that it had overheard one conversation of one of the defendants. After remand of the case by this Court to the District Court for a hearing, the Government during the course of that hearing revealed for the first time that indeed it had in its possession nine other overhearings of some of the defendants. **Hoffa v. United States**, 7 Cir., 3 Cr. L. Rep. 2457 (1968). Nor was this, it was to be determined later, the extent of the Government's illegal eavesdropping. For, nine months later, during the oral argument of the appeal taken from the District Court's decision on that hearing, the Government revealed for the first time that in fact it had in its possession records of an undisclosed number of overhearings of **defense counsel.**

The Court of Appeals for the Seventh Circuit inspected such overhearings of defense counsel and found that they were not relevant "to the Hoffa case **before this Court.**" **Hoffa v. United States**, 7 Cir., 3 Cr. L. Rep. 2457, 2458 (1968) (Emphasis supplied). Since the instant case is the only other pending "Hoffa case", it seems logical to suggest that such overhearings of defense counsel pertain to this case. The time, place, participants and content of these overhearings of the defendants and their counsel have even to this day not been disclosed to the defense.

The foregoing conduct of the Government in making one admission to the Supreme Court, another to the District Court, and still another to the Court of Appeals was characterized by Judge Swygert of the Court of Appeals for the Seventh Circuit as a "narrow and cavalier response to the Supreme Court's broad direction [and as conduct which] ought not to be condoned." **Hoffa v. United States**, 7 Cir., 3 Cr. L. Rep. 2457, 2460.

Additionally, the Government has continuously refused to submit to the defense or to any Court the contents

and detail of its admitted overhearing of the conversation of defense investigator Charles O'Brien and James Haggerty, petitioner Hoffa's trial counsel in this case, and in the said Hoffa case now pending in the Seventh Circuit Court of Appeals. See **O'Brien v. United States**, 386 U. S. 345 (1967). This overhearing has even to this date been withheld from the defense.[4]

Finally, during the week of October 21, 1968, in a Supplemental Memorandum filed in this Court, in **Gorman v. United States**, No. 173, O. T. 1968, the Government revealed for the first time that it had electronically overheard a conversation of Gorman, counsel for a co-defendant of petitioner Hoffa in said Seventh Circuit case.

We urge this Court that the conduct and tactics of the Government in the foregoing respects were so nefarious and contemptuous of the rights of these petitioners as to warrant this Court, in the exercise of its supervisory powers, to set aside the judgments of conviction of these petitioners. As Mr. Chief Justice Warren stated in his dissenting opinion in **Hoffa v. United States**, 385 U. S. 293, 315 (1966):

> "One of the important duties of this Court is to give careful scrutiny to practices of government agents when they are challenged in cases before us, in order to insure that the protections of the Constitution are respected and to maintain the integrity of federal law enforcement."

See also **Mesarosh v. United States**, 352 U. S. 1, 14 (1956), and **McNabb v. United States**, 318 U. S. 332, 341 (1943). Surely, this Court should not condone or countenance the Government's intentional suppression for over five years of evidence within its possession and which is material

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[4] After the remand in the **O'Brien** case to the District Court in Michigan, O'Brien moved to require the Government to furnish the logs of the overheard conversations, but the Government chose not to reveal same and instead, dismissed the prosecution.

to the issue of whether the constitutional rights of petitioners were violated. **Brady v. Maryland**, 373 U. S. 83, 87 (1963); **Giles v. Maryland**, 386 U. S. 66 (1967). These cases impose on the prosecution the affirmative duty to "produce at the appropriate time" evidence material to a prosecution. **Williams v. Dutton**, 5 Cir., 3 Cr. L. Rep. 2473. Surely, only reversal of the convictions here will serve to deter the Government from similar affronts to the fairness of federal law enforcement.

In **Mapp v. Ohio**, 367 U. S. 643, 659 (1961), this Court held:

> "Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence."

Further, this Court in **Mapp v. Ohio**, 367 U. S. at 659, cited with approval Mr. Justice Brandeis' dissenting opinion in **Olmstead v. United States**, 277 U. S. 438, 485 (1928), wherein he stated:

> "If the government becomes a lawbreaker, it breeds contempt for the law; it invites every man to become a law unto himself; it invites anarchy."

That only a reversal of the convictions will act as an effective deterrent to the Government is indicated by the fact that the Government's suggested procedure here would be a mere continuation of its devious and stealthy policy of deception.

For the Government states that it intends to make an *ex parte* disclosure of the eavesdropping to the District Court. The Government suggests that thereafter the petitioners may, if they choose, file a motion for collateral relief. Obviously, such procedure would not at all conform to that procedure announced by this Court in **Hoffa v. United States**, 387 U. S. 231 (1967), and **Kolod v. United States**, 390 U. S. 136 (1968), to-wit, the remand by this Court to the District Court for an adversary proceeding

to determine whether the convictions were tainted by the electronic eavesdropping.

Thus, the Government seeks to divest itself from its burden of proving in an adversary proceeding that the convictions are free of the taint of the Government's misconduct, and that its violation of the Constitutional rights of the petitioners did not contribute to the obtaining of the judgments. **Chapman v. California,** 386 U. S. 18, 24 (1967); **Silverthorne Lumber Co. v. United States,** 251 U. S. 385, 392 (1920); **United States v. Coplon,** 2 Cir., 185 F. 2d 629 (1950).

Additionally, the government's suggested disposition of the instant case would not require the Government to make full and complete disclosure of its eavesdropping activities. Such disposition would not require the disclosure of conversations in which any of the defendants indicted below participated; would not require disclosure of conversations in which defense counsel or defense investigators participated; and would not require disclosure of conversations participated in by government witnesses, defense witnesses, and other related persons discussing the petitioners or the facts of this case. Though the Government now belatedly agrees that it should not be permitted to determine *ex parte* whether a conversation is arguably relevant to a conviction, yet the Government still maintains that it may determine *ex parte* whether a defendant has standing to object to illegally overheard conversations of other persons related to this case, and that it may determine *ex parte* whether the electronic surveillance was directed against a defendant or against another.

Not only would the Government's suggested disposition not act as an effective deterrent, but it would be manifestly unfair under the circumstances of this case. Two of petitioners have served almost twenty months of a sentence of three years. They are presently eligible for

parole under the provisions of Title 18, U. S. C., Section 4202, and will likely be entitled to release from their imprisonment within the next several months under the provisions of Title 18, U. S. C., Section 4161. Under these circumstances, only a setting aside of the convictions would constitute meaningful relief. Plainly, in this posture of the case, "adequate justification" exists for the reversal of the convictions of the petitioners. **Black v. United States**, 385 U. S. 26, 29 (1966).

CONCLUSION.

For the foregoing reasons, petitioners pray that this Court grant their petition for a writ of certiorari and set aside the convictions below.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

October Term, 1968.

GIORDANO *v.* UNITED STATES.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 28. Decided March 24, 1969.*

PER CURIAM.

The petitions for writs of certiorari are granted, except that in No. 84 the writ is granted as to petitioner Franzese only and denied as to the other petitioners, and in No. 317 the petition is granted as to petitioners Mirro and McDonnell only and denied as to the other petitioners. † The judgments of the Courts of Appeals in these cases are vacated, and the cases remanded to the respective District Courts for further proceedings in conformity with *Alderman* v. *United States*, *Ivanov* v. *United States*, and *Butenko* v. *United States*, 37 U. S. L. W. 4189. It

*Together with No. 54, *Scandifia* v. *United States*; No. 84, *Franzese* v. *United States*; No. 106, *Evans* v. *United States*; No. 124, *Aiuppa* v. *United States*; No. 129, *Amabile* v. *United States*; No. 168, *Battaglia* v. *United States*; No. 271, *Clay* v. *United States*; No. 317, *DiPietto* v. *United States*; No. 474, *Natarelli* v. *United States*; No. 546, *Hoffa* v. *United States*; No. 668, *Stassi* v. *United States*; No. 715, *Randaccio* v. *United States*; No. 895, *Hoffa* v. *United States*; and No. 911, *Dranow* v. *United States*, all on petitions for writs of certiorari. Nos. 54, 84, 474, and 715 are to the United States Court of Appeals for the Second Circuit; No. 271 is to the Court of Appeals for the Fifth Circuit; Nos. 546 and 668 are to the Court of Appeals for the Sixth Circuit; Nos. 106, 129, 168, 317, 895, and 911 are to the Court of Appeals for the Seventh Circuit; and No. 124 is to the Court of Appeals for the Tenth Circuit. The motions for leave to amend the petition in No. 271 are granted. The motion to set aside the judgments of conviction in No. 546 is denied.

†We read the papers filed by the United States in these two cases as stating that the surveillances neither invaded the premises of the other petitioners nor overheard their conversations.

is not evident from the records in some of these cases whether the surveillances at issue were unlawful. It may be that the overhearings in some instances were not achieved by trespass, see *Katz* v. *United States*, 389 U. S. 347 (1967); *Desist* v. *United States*, — U. S. —, and *Kaiser* v. *New York*, — U. S. —, or for some other reasons were not unlawful. As we held in *Alderman*, *Ivanov*, and *Butenko*, 37 U. S. L. W., at 4190, n. 3, "the District Court must develop the relevant facts and decide if the Government's electronic surveillance was unlawful." Of course, a finding by the District Court that the surveillance was lawful would make disclosure and further proceedings unnecessary. Similarly, it is not clear that each petitioner has standing to assert the illegality of the surveillance or of the introduction of its fruits. As in *Alderman*, *Ivanov*, and *Butenko*, these issues are to be resolved by the District Courts in the first instance.

MR. JUSTICE BLACK dissents, except in Nos. 895 and 911, in the consideration and disposition of which he took no part.

MR. JUSTICE WHITE took no part in the consideration or disposition of Nos. 546, 895, and 911.

MR. JUSTICE MARSHALL took no part in the consideration or disposition of Nos. 28, 106, 129, 168, 271, 546, 895, and 911.

MR. JUSTICE STEWART, concurring.

A few words in amplification of this *Per Curiam* opinion may help to avoid misunderstanding on the part of the litigants, and of the District Courts to which these cases are remanded.

As we made explicit in *Alderman*, *Butenko*, and *Ivanov*, the requirement that certain products of governmental electronic surveillance be turned over to defense counsel was expressly limited to situations where the surveillance

had violated the Fourth Amendment. We did not decide in those cases, and we do not decide in these, that any of the surveillances *did* violate the Fourth Amendment.[1] Instead, we have left that threshold question for the District Courts to decide in all these cases.

Moreover, we did not in *Alderman, Butenko,* or *Ivanov,* and we do not today, specify the procedure that the District Courts are to follow in making this preliminary determination. We have nowhere indicated that this determination cannot appropriately be made in *ex parte, in camera* proceedings. "Nothing in *Alderman* v. *United States, Ivanov* v. *United States,* or *Butenko* v. *United States, ante,* —, —, requires an adversary proceeding and full disclosure for resolution of every issue raised by an electronic surveillance." *Taglianetti* v. *United States, post,* —.

Finally, the Court has not in any of these cases addressed itself to the standards governing the constitutionality of electronic surveillance relating to the

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[1] In oral argument of the *Butenko* and *Ivanov* cases, the Solicitor General, mystifyingly, sought to concede that the surveillances there *were* in fact unconstitutional, although he was repeatedly invited to argue that they were not. The following colloquies during oral argument of the *Ivanov* case are illustrative:

"Q. Are you asking us to decide here or to leave open on remand the question as to whether this violates, this bugging in this particular case, violates the Fourth Amendment?

"A. Our position would be the same had it or not. We are not arguing that it did not violate the Fourth Amendment.

"Q. In other words, the premise in which you are proceeding here is that you admit for the purposes of this case that this was illegal bugging?

"A. Yes, Mr. Justice.

"Q. And you are going to remain free to argue to the district judge that there was no violation?

"A. No, Sir."

In deciding those cases, the Court declined to accept the Solicitor General's proffered concession.

gathering of foreign intelligence information—necessary for the conduct of international affairs, and for the protection of national defense secrets and installations from foreign espionage and sabotage. MR. JUSTICE WHITE has elsewhere made clear his view that such surveillance does not violate the Fourth Amendment, "if the President of the United States or his chief legal officer, the Attorney General, has considered the requirements of national security and authorized electronic surveillance as reasonable." [2] While two members of the Court have indicated disagreement with that view,[3] the issue remains open.[4]

One might suppose that all of this should be entirely clear to any careful reader of the Court's opinion in *Alderman, Butenko,* and *Ivanov.* Perhaps so, and perhaps, therefore, what I have said is quite unnecessary. But 10 years of experience here have taught me that the most carefully written opinions are not always carefully read—even by those most directly concerned.

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[2] *Katz* v. *United States,* 389 U. S. 347, 364 (concurring opinion).

[3] *Katz* v. *United States,* 389 U. S. 347, 359 (concurring opinion of MR. JUSTICE DOUGLAS).

[4] See *Katz* v. *United States,* 389 U. S. 347, 358, n. 23.